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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL.,
Appellants

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

No. 60

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*

On Appeal From The United States District Court For The Northern District of Illinois

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BRIEF FOR FREIGHT FORWARDER APPELLEES

STATUTES INVOLVED

In addition to the statutes specified in appellants' briefs, this case also involves Section 410(c) of the Interstate Commerce Act (49 U.S.C. 1010(c)), which is printed in the Appendix hereto, p. 78.

STATEMENT

All of the appellees for whom this brief is filed are freight forwarders, operating under permits issued by the Interstate Commerce Commission pursuant to Section 410(c) of the Interstate Commerce Act. These freight forwarders were parties to the proceeding in which the Commission entered the order promulgating the rules that are involved in these appeals. They filed a complaint in the court below (R. 9) to set aside the portion of the Commission's order in which the Commission promulgated Rules 2 and 3 (322 I.C.C. at 336-337).*

Freight forwarding is authorized and regulated in Part IV of the Interstate Commerce Act, which was enacted in 1942 (49 U.S.C. 1001 *et seq.*). The term "freight forwarder" is defined in Section 402(a)(5). A freight forwarder holds itself out to the general public as a common carrier to transport or provide transportation of property but, except in terminal areas, it cannot perform the physical transportation (49 U.S.C. 1010(h)). It assembles individual shipments and consolidates them; it ships the consolidated shipment by an operating line-haul common carrier (usually a railroad) to a destination point. The freight forwarder there separates the individual shipments and distributes them to the consignees.

The principal competitors of freight forwarders are the common and contract carriers of property by motor vehicle, which are defined and regulated by Part II of the Interstate

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* In a suit pending in the United States District Court for the Northern District of Texas (*Lone Star Package Car Co.* v. *United States*, Civil Action No. 4-355) certain freight forwarders and railroads seek to set aside the Commission's ruling in the same Commission proceeding that Plan I TOFC service is authorized as a through route arrangement under Section 216(c) of the Act. That issue is not involved in these appeals.

Commerce Act (49 U.S.C. 301 *et seq.*). The volume of traffic handled by the motor carriers dwarfs that of the forwarders and has increased very rapidly in the recent years in which TOFC service has expanded.* The Class I intercity motor carriers of property had revenues of $4 billion in 1956 and $7 billion in 1965. In contrast, the Class A freight forwarders had less than half a billion dollars in revenues in each year, and their 1965 revenues were only $42 million more than in 1956.

Notwithstanding the marked and increasing competitive success of the motor carriers vis-a-vis the forwarders, however, the activities of the forwarders meet the needs of certain shippers** and provide the public with the benefits of competition from a mode of transportation that differs from the highway carriers.

Unlike motor carriers, the freight forwarders do not have the important competitive benefit of being authorized by Congress to enter into through routes and joint rates with rail carriers or with motor or water carriers. Authority to make such arrangements, on a voluntary basis for all participating carriers, is given to motor carriers in Section 216(c) of the Act (49 U.S.C. 316(c)), but not to freight forwarders. Because of the forwarders' lack of authority to make joint rate arrangements, the forwarder, unlike the motor carrier, cannot negotiate private agreements

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* 80th Annual Report of I.C.C., 1966, pp.170 (Table 34) and 180 (Table 56).

** Section 406(d), regarding rates of freight forwarders, provides that "the Commission shall give due consideration . . . to the inherent nature of freight forwarding . . . [and] to the need, in the public interest, of adequate and efficient freight-forwarder service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable freight forwarders, under honest, economical, and efficient management, to provide such service." (49 U.S.C. 1006(d))

under which a railroad agrees to accept, for its "division" of the total charge, an amount lower than the tariff rate.*

On the other hand, the traditional and unique right of freight forwarders was specifically recognized by Congress. The sole provision of the Act for a carrier that "utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act"—*i.e.*, a rail, motor or water carrier—is in the statutory definition of a freight forwarder (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). In utilizing the services of a rail carrier pursuant to this authority, by making shipments under rail tariffs like any other shipper, the forwarder must pay the full tariff rates.

One of the provisions in Part IV of the Act, concerning permits to engage in freight forwarding, is as follows:

> "No such permit shall be issued to any common carrier subject to part I, II, or III of this act . . . ." (Sec. 410(c); 49 U.S.C. 1010(c)).

As explained by the House Committee on Interstate and Foreign Commerce in recommending enactment of the bill to regulate freight forwarding, these provisions "are intended to carry out the policy of permitting such carriers [rail, motor and water carriers] to engage in freight forwarding indirectly, through control of subsidiary corporations, but of *not permitting them to engage directly in the freight-forwarding business.*"** H. of R. Report No. 1172,

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* The Pennsylvania Railroad, for example, receives a "materially lower" amount from motor carriers in handling TOFC traffic under Plan I (held by the Commission to be a through route arrangement) than it does for handling TOFC traffic for the public under its tariff Plan III service (R. 382-3).

** Italics in this brief are ours except where otherwise indicated.

77th Cong., 1st Sess., Aug. 13, 1941, p. 15) Neither that policy nor Section 410(c) was mentioned in the present Commission report.

In a general investigation proceeding in 1939, three years after the motor carrier Part II of the Act became effective, and three years before adoption of Part IV, the Commission held it to be unlawful, under the provisions of Part II, for a rail carrier to act as a shipper of its traffic by motor carrier and similarly unlawful for a motor carrier to act "as a forwarder or shipper" and ship its traffic over a railroad. *Substituted Freight Service,* 232 I.C.C. 683, 688, 690. In various other decisions, some of which also preceded adoption of Part IV, the Commission reiterated this holding regarding both rail boxcar service and rail TOFC service. In a declaratory order proceeding in 1954, reaffirming the interpretation, the Commission held that it is unlawful for a motor carrier to utilize rail TOFC service by acting as a shipper under the railroad's tariffs, and the Commission warned the railroads that they should not "knowingly join" with a motor carrier "in a violation of the law." *Movement of Highway Trailers by Rail,* 293 I.C.C. 93, 104-105.

The Commission has repeatedly sought from Congress an amendment to the Act to give the Commission authority to order through routes and joint rates into effect between motor carriers and railroads.* Congress, however, has declined to amend the Act as requested and has left such arrangements to be made on the voluntary basis that is set out in Section 216(c) (49 U.S.C. 316(c)).

No proposals that we know of have been made to Congress to amend the Act to extend to rail, motor or water carriers the forwarder's comprehensive authorization of

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* 75th Annual Report of I.C.C., 1961, p. 186; 76th Ann. Rep., 1962, p. 201; 77th Ann. Rep., 1963, p. 19.

shipping traffic over another carrier. The President's Transportation Message of 1962, however, said that certain "changes to the Interstate Commerce Act . . . are needed" and, among other things, recommended "that legislation be enacted to . . . assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers." (H. of R. Doc. No. 384, 87th Cong., 2d Sess., p. 5). Under that proposal, the Act would be amended so that the general statutory rule that it is unlawful under the Act for a rail carrier to ship its customers' property over a motor carrier, and for a motor carrier to ship its traffic over a rail carrier, would have the one exception, namely, the right to ship vehicles or containers, loaded with the customers' goods.

Bills intended to provide that exception to the general statutory principle were introduced in Congress. Shortly thereafter, on June 29, 1962, the Commission, on its own motion, instituted the proceeding in this case. Committee hearings were held on the bills and various witnesses appeared at the hearings, expressing differing views. No witness, as far as we have been able to ascertain, expressed a view that it would be lawful, under the Act without amendment, for a motor carrier to ship either loaded vehicles and containers or any other property of their customers over another carrier; or for a railroad to do so with respect to its traffic.

Rules 2 and 3, which are at issue here, are set out in the Commission's report (322 I.C.C. at 336-337). A copy of that report is in the printed record opposite page 794. The essence of Rule 3, reversing the previously established statutory interpretation, is that:

> "motor common and contract carriers [and] water common and contract carriers . . . may utilize TOFC

service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier." (322 I.C.C. at 337)*

Previously the Commission had warned rail carriers against knowingly participating in a motor or water carrier's violation of the Act by providing rail service for TOFC or other freight traffic tendered by motor and water carriers acting as shippers under a rail tariff. Under Rule 2, however, the railroads would be required to carry such TOFC freight under their tariffs whenever requested to do so by those carriers.

The dissent of Commissioner Webb, who was then Vice Chairman, pointed out that the new rules violated the terms and purposes of the Act and that Rule 2 "may very well destroy the freight forwarding industry"** (322 I.C.C. at 394). For reasons discussed in our argument below, he aptly observed that "Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine . . . . Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act" (*Id.* at 395).

The three-judge District Court unanimously ordered the Commission report and order set aside insofar as it pre-

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* The rule also includes freight forwarders but forwarders have the statutory right to utilize the services of railroads (Sec. 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)).

** "[T]he prescription of open-tariff TOFC service is rash, contrary to law, and harmful to carriers of all modes and shippers of all sizes" (322 I.C.C. at 387).

scribes Rules 2 and 3 (R. 45). The rules were held invalid on several bases. One basis was that the rules violated the terms and purposes of Part II of the Act. Another basis was that the rules run counter to the provisions of Part IV of the Act which forbid any person to act as a freight forwarder without a permit issued by the Commission and which prohibit the issuance of such a permit to a common carrier by rail, motor or water. Both the violations of Part II and the violations of Part IV would have drastic effects upon the freight-forwarding industry.

SUMMARY OF ARGUMENT

The basic scheme of the Interstate Commerce Act is for each transportation agency to provide service to the public in its own particular mode. The agencies compete in getting the shippers' goods from origin to destination by their respective modes of operation. There are exceptions to this basic scheme, such as for through route arrangements or for a motor carrier permit to a railroad. None of the provisions, however, includes permission for rail, motor or water common carriers to engage in freight-forwarding operations on all or part of their traffic rather than providing transportation in the manner described in their I.C.C. certificates or in the part of the Act that regulates their particular mode.

Congress has adopted a "policy . . . of not permitting [common carriers by motor, water or rail] to engage directly in the freight-forwarding business." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15) Under the policy, those line-haul carriers are permitted only "to engage in freight forwarding indirectly, through control of subsidiary corporations . . ." (*Ibid.*) Congress "believed that this policy will result in more satisfactory administra-

tion of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted" (*Ibid.*). To "carry out the policy" Congress specifically directed the Commission not to grant a freight-forwarding permit to any common carrier by rail, motor or water. (Sec. 410(c); 49 U.S.C. 1010(c))

Congress has not repealed or amended the policy or the terms of Section 410(c). To permit motor carriers and water carriers to act as shippers or forwarders under rail tariffs, thus permitting them to engage in freight forwarding, is contrary to Section 410(c) and to the clear intent of Congress.* This is true regardless of whether the motor carriers ship on rail boxcar tariffs or on rail TOFC tariffs. And it is true regardless of which line-haul carrier seeks to ship over another.

As the Commission repeatedly held, in cases both prior to and after enactment of Part IV in 1942, transportation performed by motor carriers in accordance with the provisions of Part II does not include shipping the customers' goods by rail instead of transporting them. If a motor carrier were to act as a shipper, such shipping would not be an activity performed as a carrier subject to Part II and would not be exempted from Part IV.

There is no merit to appellants' attempts to justify Rules 2 and 3 on the grounds: that a motor carrier engaged in shipping traffic would still have to handle at least some shipments in actual motor carriage over the public highways in order to prevent his motor carrier certificate or permit from becoming dormant; that he would have to perform actual motor carriage if any shipper specifically

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* Examples of the motor-carrier forwarding activity that Rules 2 and 3 would permit are provided in Point I below.

requested it; that the Commission somehow would prevent "excessive" shipping by a motor carrier or his "over-enthusiastic embracing of piggyback"; and that a motor carrier would only be permitted to act as a shipper for TOFC service between points which it is authorized to serve by motor vehicle over public highways. Under the Act, the Commission has no authority to permit motor or water carriers to engage in freight forwarding with respect to any of their traffic. The rules would render nugatory the efforts of Congress to prevent such carriers from engaging in the freight-forwarding business.

Where a motor carrier would be tendering to the railroad a single shipment in a single trailer, without consolidation, Part IV would not apply because the consolidating function is an element in the definition of a freight forwarder (Sec. 402(a)(5)(A); 49 U.S.C. 1002(a)(5)(A)). But Part II does not allow a motor carrier to perform his regulated service by rail shipping. The statutory definition of "common carrier by motor vehicle"; the prohibition against engaging in business "by motor vehicle . . . on any public highway" without a motor carrier certificate or permit; the provisions for specification of particular highway routes in the certificates or permits; and the prohibition against deviating from the specified highway routes all unequivocally evidence the intention that motor carriers must perform their service in ways authorized in Part II. Motor-carrier shipping by rail would be much less consonant with the purposes and terms of Part II than would the prohibited use of private roads or unauthorized highway routes.

Section 216(c) of Part II is the statutory provision for motor-rail coordinations; it permits voluntary arrangements for through routes and joint rates between motor and rail carriers. Neither it nor any other section permits

a motor carrier to ship traffic under a rail tariff for any type of rail service.

Despite their professed objective, Rules 2 and 3 would create gross inequalities, damaging to the freight-forwarding industry, rather than produce equality between motor carriers and forwarders. In the words of the Government: "A railroad may, if it wishes, forego piggyback open tariffs altogether—in which event it will not be in violation of the Commission's rules" (Govt. Br. 23). Freight forwarders and private shippers would thereby be totally excluded from direct access to TOFC service, since their only right to participate in TOFC is the right to ship under open tariffs. Motor carriers, however, would continue to participate in TOFC under Plans I and V, which are not open tariff plans. With freight forwarders totally excluded from TOFC, and with motor carriers being allowed access to TOFC, the present inequalities that handicap forwarders in competing with motor carriers would be drastically compounded.

Even if and where existing TOFC tariffs were continued in full effect, the rules would permit a railroad to continue to make private negotiated contracts with motor carriers under Plans I and V under which the railroad would accept a *lower* amount for its services than the amount of the tariff rates paid by forwarders. Payment of such a lower amount by a forwarder, however, and acceptance by a railroad, would be an illegal rebate. These inequalities would exist and be permitted under the rules, since the rules apparently would apply only to TOFC open tariff service.*

The motor carriers would retain every one of their operating rights under which they have increased their

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* Harmful effects of the rules on the level of TOFC rates to the forwarders and the public are discussed in Point II below.

annual revenues by three billion dollars in the last decade. And they would now acquire the additional right to operate in the only method that is permitted to freight forwarders. The only inherent, distinctive advantage of the forwarder mode would be given to motor carriers with no reciprocal competitive benefits to the forwarders.

The legislative history of several proposals in the 1960's for amendments to the Interstate Commerce Act evidences the conflict between Rules 2 and 3 and the Act. The Commission has repeatedly asked Congress to amend Section 216(c) to grant power to the Commission to order through routes and joint rates into effect between motor carriers and railroads. Such power would include authority to order both railroads and truckers to establish through routes and joint rates for movement of a motor carrier's loaded trailers. Congress, however, has declined and continues to decline to grant the sought power to the Commission.

When President Kennedy in 1962 asked for an amendment to the Act under which all carriers would have a right to ship trailers on other carriers, and bills were introduced for that purpose, no witness at the Committee hearings, as far as we can ascertain, took the position that rail, motor or water carriers already have that right under the Act. A representative of the freight-forwarding industry detailed the many sections which would have to be amended if such a right were to be created. A representative of the motor carriers urged that motor carriers should be treated as carriers rather than being forced into a behavior pattern that is shipper oriented. The Commission, among other things, informed the Committee that the proposed amendment had far-reaching ramifications and could have drastic effects upon the basic relationships between carriers.

Congress, over many years, has established and carried into effect its own policies balancing the relationships among the several modes of operation in the transportation industry. The new rules are squarely in conflict with those policies and with the provisions of the Act.

ARGUMENT

I. RULES 2 AND 3 WOULD PERMIT MOTOR CARRIERS AND WATER CARRIERS TO ENGAGE IN FREIGHT FORWARDING IN VIOLATION OF PART IV OF THE INTERSTATE COMMERCE ACT

A. The Policy and Mandate of Congress Against Permitting a Motor Carrier to Engage in Freight Forwarding

Congress deliberately adopted a "policy . . . of *not* permitting" common carriers by motor, water or rail "to engage directly in the freight-forwarding business." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15). To carry out that policy, and to guard against its possible violation by the I.C.C., Congress enacted a mandate in Part IV of the Interstate Commerce Act. The mandate expressly directs the Commission not to issue a freight-forwarding permit to any common carrier by motor, water or rail (49 U.S.C. 1010(c)). Rules 2 and 3, however, would give blanket permission to all motor or water carriers to engage in freight forwarding.

The essential characteristic of freight forwarding that distinguishes it from the other modes of transportation is that a freight forwarder *ships* the goods of its customers over other carriers for line-haul transportation. This right to utilize other carriers "for the whole or any part of the transportation of" shipments (49 U.S.C. 1002(a)(5)(C))

is explicitly and uniquely the right of forwarders, not motor, water or rail carriers. Yet Rules 2 and 3 would give the same permission to motor and water carriers to *ship* their customers' goods by rail, using the rail TOFC rates and service, in lieu of performing "all or any portion of their authorized service" (Rule 3(a)). Motor and water carriers would thus clearly be permitted to engage directly in the freight-forwarding business.

As the District Court found (R. 35-36), the new rules are counter to the provisions of Part IV of the Interstate Commerce Act regulating freight-forwarding activities. The rules would flout the policy and the statutory mandate of Congress, but the Commission report wholly ignored both that policy and the mandate.

Part, but only part, of the authorized functions of freight forwarders and motor carriers are similar. Both perform the function of assembling and consolidating shipments of their customers into consolidated lots for movement to the destination area.* At the destination, both forwarders and motor carriers separate individual shipments (*i.e.*, "break bulk") and distribute the individual shipments to consignees. Railroads and water carriers also perform these same functions with respect to their handling of the smaller shipments of their customers.

For the line-haul transportation of the consolidated lot, however, the forwarders do what their name implies. They forward the consolidated shipment, shipping it over one of the physical carriers, usually a railroad. This is the essence of the freight-forwarding business. The critical difference between the functions of freight forwarders and of the car-

* In addition to consolidated shipments, motor carriers transport other traffic without consolidation, hauling only one shipment with one motor vehicle.

riers by motor vehicle, water or rail is that the forwarders are not permitted to perform the line-haul movement or to make through route or joint rate arrangements with the physical carriers, and the latter are not authorized to act as forwarders.

Under Rules 2 and 3, however, motor and water carriers would be permitted to ship a consolidated lot of individual shipments by rail. The rules would thus permit them to become freight forwarders, at their option, "in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). The statutory mandate from Congress prohibiting the Commission from permitting motor and water carriers to engage in the freight-forwarding business would be violated.

The mandate is in Section 410 of the Act, this being the section which prohibits interstate freight forwarding without a permit from the Commission (subsection (a)) and provides for the issuance by the Commission of permits to engage in freight-forwarding activities (subsections (b) and (c)). Congress has directed that:

> "No such permit shall be issued to any common carrier subject to part I, II, or III of this Act. . . ." (Sec. 410(c); 49 U.S.C. 1010(c))

Railroads, of course, are subject to Part I, motor carriers to Part II and water carriers to Part III. The purposes of Congress are clear. The mandate is unqualified; it provides no exception as to freight-forwarding activities between any particular points. A motor carrier company, for example, that has operating rights to transport shipments between New York and San Francisco by motor vehicle over public highways cannot lawfully be granted permission by the Commission to consolidate shipments in New York and then ship the consolidated lot by rail from New York to

itself at San Francisco for distribution to the consignees of the individual shipments.* Yet this permission to engage directly in freight forwarding is exactly what the Commission would grant to motor carriers, under Rules 2 and 3.

After denying to motor, water and rail carriers the right to obtain permission to engage in the freight-forwarding business, Section 410 permits them, by subsections (c) and (d), to have stock control of a freight-forwarder corporation. This careful separation of activities between forwarders, on the one hand, and motor, water and rail carriers, on the other, was done deliberately in carrying out the definite policy of Congress. The Report of the House Committee on Interstate and Foreign Commerce regarding the bill to regulate freight forwarders (now Part IV of the Act) includes the following:

> "The provisions of this subsection, as well as those of section 410(c), are intended to carry out the policy of permitting such carriers to engage in freight forwarding indirectly, through control of subsidiary corporations, but of *not permitting them to engage directly in the freight-forwarding business. It is believed that this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted.*" (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15)

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* An example of a single-line, coast-to-coast motor carrier is described in *Pacific Intermountain Express Co. — Control and Merger—All States Freight, Inc.*, 101 M.C.C. 137 (1966). In approving the merger of these motor carriers that had combined revenues of more than $100 million for 1965, the Commission noted that "an improved through single-line, coast-to-coast, transcontinental service would replace the joint-line service heretofore provided" (*Id.* at 146).

At the outset of that Report, the Committee noted that:

> "Forwarders perform a *unique* type of transportation service by means of coordinated use of the facilities of rail, motor, and water carriers in the transportation of freight.
>
> ". . . They utilize the services of rail, motor, and water carriers, and ship by whatever means will afford the shortest and most expeditious medium, and, as a general rule, do not themselves operate physical transportation facilities." (*Id.* at 1)

This mode of operation, properly characterized by the House Committee as "unique," is the mode that the Commission would now throw wide open to the motor carriers and the water carriers. By Rules 2 and 3 the Commission would destroy the Congressional plan for separation of the activities of the various kinds of carriers in the transportation industry.

If motor carriers were permitted to operate under the authority that Rules 2 and 3 would grant to them, the New York-San Francisco motor carrier could accept shipments from its customers at its dock in New York; call up the railroad and tell it (under a rail TOFC Plan II tariff) to send trucks and trailers to that dock to pick up the consolidated shipment; tell the railroad to transport the consolidated shipment to San Francisco to the motor carrier's dock there; and then distribute the goods to the motor carrier's consignees at that dock in San Francisco. No part of the actual movement of such a shipment would be performed by the motor carrier.

Or (if it chose to utilize a rail TOFC Plan III tariff) the motor carrier could place the goods in its own trailers, either at the shippers' docks or at its own dock, and take them through the streets to the railroad's yard in the origin terminal area for a rail haul to the rail-

road's yard at the destination as a shipment by the motor carrier, in the capacity of a shipper under the railroad's tariff, with subsequent distribution of the individual shipments by the motor carrier to the respective consignees. No part of the line-haul movement of such a shipment would be performed by the motor carrier. The so-called "motor carrier," acting as a shipper by rail, would be doing exactly what forwarders do—and doing exactly what Congress in Section 410(c) has forbidden the Commission to permit motor carriers to do.

Moreover, the scope of the projected invasion into the field of the freight forwarders would apparently go even further. Motor carriers are permitted under Section 216 (c) (49 U.S.C. 316(c)) to establish through routes and joint rates between themselves. Many such through routes and joint rates have been agreed to and published in the tariffs. For example, a New York-Chicago motor carrier may join with a Chicago-Seattle motor carrier to publish a joint rate between New York and Seattle, under the authorization of Section 216(c). Instead of performing the motor carrier service that is authorized in Part II of the Act, these carriers, under Rules 2 and 3, could engage in freight forwarding, shipping by rail between New York and Seattle under the rail TOFC rates. Any two points in the United States that have rail TOFC service could thus be served by motor carriers through a freight-forwarding operation, without the use of motor vehicles or public highways between the two points for shipments so handled in the freight-forwarding manner.*

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* The Government states that, under the rules, a motor carrier could offer the rail service "only with respect to routes covered by its certificate" (Govt. Br. 66). The Government may thus be saying that it would be unlawful under the Act for motor carriers to forward shipments by rail TOFC in situations where motor carriers

Under Rule 3(b), the Commission would give the motor carrier's customer the privilege of directing the motor carrier to transport his particular shipment rather than to forward it. On other shipments, however, the rules would permit the motor carrier, at its own option, either to exercise its authority under Part II to furnish the transportation or to leave that authority unexercised and, instead, to "utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier" (Rule 3(a)). Nothing in the Act or in the policy of Congress indicates that the authority or lack of authority of a carrier to engage in freight forwarding is to be determined by whether particular customers of that carrier do not forbid the forwarding of their shipments. Neither is there any indication that a company holding authority under Part II to transport by motor vehicle has any right to leave that Part II authority unexercised on part or all of its shipments and to engage in freight forwarding on those shipments.

Rules 2 and 3, granting permission to motor carriers to forward shipments by rail unless the customer forbids that forwarding, would make a mockery out of the policy and mandate of Congress that no common carrier by motor vehicle should be permitted by the Commission to engage in the freight-forwarding business. In the words of the District Court in this case:

> "No reason is suggested why we should suppose that Congress meant to allow a motor carrier to perform only the services of a freight forwarder, not as an inci-

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have formed a through route and published a joint rate. We submit that freight forwarding by motor carriers is unlawful regardless of whether the authorized motor route between the two terminals is a single-line route of one motor carrier or a through route made by joining the routes of two or more motor carriers.

dent to furnishing transportation, merely because the carrier holds a bare unexercised authority to furnish transportation, while at the same time Congress prohibited the licensing of motor carriers as freight forwarders." (R. 36)

B. The Commission Report

The Commission did not even mention Section 410(c) in its report promulgating Rules 2 and 3 and did not refer to the policy of Congress against permitting motor, water or rail common carriers to engage in the freight-forwarding business. The Commission's *sole* reference to freight-forwarding aspects of Rules 2 and 3 consists of two sentences:

> "Of course, should the first carrier hold out to perform what may amount only to assembly and distribution services at points, and should it use the underlying transportation of the second carrier between points, which it cannot itself serve in a practicable manner, it would no doubt be found to be operating not as a carrier but as a freight forwarder as defined in section 402(a) of the act. Where it does have the requisite authority, it may perform such service not as a forwarder but as a carrier because section 402(a)(5) defines a freight forwarder as any person performing forwarding services *other than as a carrier subject to parts I, II, or III of the act.*" (322 I.C.C. at 335; italics by the Commission)

The Commission thus would disregard the nature of the actual forwarder business which it would permit motor carriers to conduct under Rules 2 and 3. The activity to be permitted to those motor carriers would be precisely the activity of freight forwarders. Under the terms of Rule 3, the motor carriers would be permitted to perform "all or any portion of their authorized service" by the freight-forwarding mode, shipping by TOFC on all ship-

ments except the ones, if any, from customers who direct that their shipments not be forwarded.*

Section 402(a)(5), to which the Commission refers in its report, does not permit a motor carrier to act as a shipper or forwarder. That provision of Part IV reads as follows:

> "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act." (49 U.S.C. 1002(a)(5))

With respect to a motor carrier, the parenthetical phrase

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* The Government apparently does not defend the comprehensive terms of Rule 3. It states that a motor carrier that abandoned the highways on all shipments, instead of transporting some by motor vehicle, could have its motor carrier certificate "revoked for dormancy"; it also says that the Commission would prevent "overenthusiastic embracing of TOFC service" (Govt. Br. 58). But if the authority to act as a motor carrier under Part II actually did include the right to act as a shipper or forwarder using rail TOFC service, such a motor carrier would be entirely within his statutory rights by using that forwarder mode on all shipments. (See pp. 29-30, 35-36, *post*.) The fact is that the Act does not permit the motor carrier to engage in *any* freight forwarding.

"otherwise than as a carrier subject to part .. II .. of this Act" plainly refers to the motor carrier's authorized activity to assemble and consolidate shipments and then to transport "by motor vehicle" and "over public highways" (or pursuant to a through route established under Section 216(c)) for separation and distribution at destination to the respective consignees. These functions it does as a carrier subject to Part II. But if a motor carrier were to ship the goods it would, instead, be acting "as a shipper," thereby engaging directly in the freight-forwarding mode of operation, rather than serving "as a carrier subject to" Part II of the Act, and the exemption would not apply.*

If the intent of Congress had been that any motor carrier was to be permitted to act as a freight forwarder, utilizing the services of a railroad for the actual transportation, the parenthetical exception would have been phrased differently. It would have directly excepted carriers that are subject to the other parts, rather than saying "as" a carrier subject to those parts. Indeed, the original freight forwarder bills, H.R. 9089 and S. 3665, did directly exempt "a common carrier by railroad, a water carrier, a motor carrier," etc.** In the bills that superseded them in the 77th Congress,*** however, that comprehensive language

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* At page 31 of its brief, where it is *not* discussing the freight-forwarding questions, the Government openly refers to the motor carriers as "one class of shippers" and urges that "when a carrier tenders goods *as a shipper*, it is entitled to the same treatment as any other shipper."

** See Hearings before a Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 76th Cong., 3d Sess., on S. Res. 146, June 5, 1940, p. 2.

*** The 77th Congress was the one in which the policy was adopted of not permitting common carriers by rail, motor or water to engage in freight forwarding.

was changed to restrict it to the language that was adopted. Instead of looking to the carrier status of the company, the language adopted looks to the nature of the particular activity of the company.

The purpose of the actual parenthetical phrase was explained in the Report of the House Committee mentioned above, as follows:

> "The definition, it will be noted, does not include a person by reason of a holding out to transport or provide transportation 'as a carrier subject to part I, II, or III' of the Interstate Commerce Act. The purpose of this provision is primarily to avoid regulation, under part IV, of the operations of *express companies,* which might otherwise have been considered to be included within the definition. It was deemed desirable to refer to the other carriers in order to clearly carry out the policy of not having part IV apply with respect to transportation performed by railroad, motor and water carriers in accordance with the applicable provisions of the Interstate Commerce Act." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 6)

Thus, where "transportation" is "performed by" a motor carrier in accordance with the applicable provisions of Part II of the Act, no freight forwarding is involved. The motor carrier is transporting the consolidated lot of the several individual shipments all the way in its motor vehicle over the public highways or is interchanging with another carrier under a voluntary through route arrangement pursuant to Section 216(c). What the Commission here proposes to do, however, is to permit the motor carrier merely to ship the consolidated lot by rail, rather than perform the transportation. That permission would be contrary to the deliberate Congressional policy, expressed at page 15 of the very same Report of the House Committee, against "permitting them [motor carriers, etc.] to engage directly in the freight-

forwarding business."* The Commission's action would nullify the direction from Congress to the Commission in Section 410(c) that no permit to engage in freight forwarding should be granted to a rail, motor or water common carrier.

C. The Government's Arguments in Support of Permitting Motor Carriers to Engage in Freight Forwarding by Rail TOFC Service

The Government properly states in its brief (p. 64) that "The background of Part IV is instructive" but it very seriously misreads and misinterprets that background. The legislative history firmly supports the decision of the court below.

For one thing, the Government completely ignores the portion of the legislative history of Part IV in which Congress expressed its adoption of a policy against permitting motor, water or rail carriers to engage in the freight-forwarding business except through the ownership of stock in a freight forwarder. That express policy would be directly violated by Rules 2 and 3, yet the Government does not even mention the policy.

Moreover, the Government incorrectly indicates at pages 64 and 65 (without precisely so stating) that in the years of legislative consideration of Part IV it was deemed lawful for motor carriers to ship their customers' goods by rail. The facts are quite to the contrary, as the following brief review of the decisions of that period will show.

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* The Government brief omits mention of this express statement of the policy of Congress even though the brief, at page 64, quotes one phrase from page 6 of the same Committee Report. The phrase it quotes is an excerpt from the full statement set forth above.

Part IV was adopted in 1942. Part II, regulating motor carriers, had been adopted in 1935 and became fully effective in 1936. In 1938 the Commission instituted a general investigation of the lawfulness of practices of rail, motor and water carriers in regard to the substitution by one carrier of the services of another carrier.* The Commission found both that some eastern railroads had been shipping freight by certain motor carriers and that one western motor carrier had been shipping its customers' goods by rail between certain points on the motor carrier's authorized routes. The Commission held that both of these practices were unlawful under the Act, and it condemned them in no uncertain terms. Regarding the railroads, the Commission held that "they cannot act as common carriers by rail and shippers by motor vehicles as to identically the same service." *Substituted Freight Service*, 232 I.C.C. 683, 688 (1939). Regarding the motor carrier which was found to have been acting "as a forwarder or shipper," the ruling was the same. The Commission held that ". . . for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry [*i.e.*, the points be-

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* In a case involving the validity of TOFC tariffs published before Part II became effective, the Commission had said that a motor carrier using that service had the status of a common carrier as to the entire haul and the status of a shipper as to a part thereof (*Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435 (June 20, 1936)), but when Part II became effective a joint arrangement was promptly made by the carriers involved and was held to be lawful under Section 216(c) of Part II (*Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245 (Nov. 17, 1936)).

tween which the motor carrier was shipping by rail]."* (*Id.* at 690)

A year later, and two years before the adoption of Part IV of the Act, the Commission again condemned as unlawful a motor carrier's practice of shipping over another carrier. *Greer Broker Application,* 23 M.C.C. 417 (1940). This time the second carrier was itself a motor carrier. After referring to the *Substituted Freight Service,* case, the Commission said:

> "This practice was stated by the Commission to be repugnant to the act, more particularly to sections 202(a), 206, 207, 208, 216, 217, and 219 thereof. . . . In our opinion, the practice of applicant as disclosed in this proceeding cannot be approved, for reasons similar to those set forth by the Commission." (23 M.C.C. at 420)

In 1942, the year in which Part IV was enacted, the Commission reiterated its ruling:

> "Thus applicant, in effect, is acting as a common carrier by motor vehicle and a shipper by rail as to the same traffic, a situation which is repugnant to the provisions of the act." *Stone's Express, Inc., Common Carrier Application,* 32 M.C.C. 525, 527 (1942)

Thus the ruling that it is unlawful under the Act for a motor carrier to ship its customers' freight over another carrier, paying the tariff rates of the other carrier, had

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* This *Substituted Freight Service* decision is discussed in more detail at pages 50-58 of this brief. The Commission further stated that if "appropriate concurrences" of the participating carriers were published, a lawful arrangement would result. Without published concurrences (and Rules 2 and 3 do not provide for concurrences) the Commission held that there was a shipment by one carrier over another, unlawful under the Act.

been explicitly declared both prior to and during the period when enactment of Part IV was under consideration by Congress. Contrary to the inference in the Government's brief at pages 64-65, there was no occasion for the forwarders to request enactment of further statutory prohibitions against that shipping practice; the practice already had been repeatedly recognized to be unlawful. And Congress, in enacting Part IV, made doubly sure on this point, by adopting Section 410(c) to prohibit the Commission from granting any freight forwarding permit to a common carrier by rail, motor or water.

The Government makes a totally irrelevant argument that "in part IV of the Act, Congress did not intend to preclude motor carriers from performing their traditional pickup and delivery function, albeit it is physically similar to the service performed by freight forwarders" (Govt. Br. 64). No one argues that Part IV precludes motor carriers from performing pickup and delivery. All carriers perform those functions. The distinguishing characteristic of the various carriers' functions, however, concerns the line-haul transportation after pickup and before delivery. Forwarders ship the consolidated lot of the freight they have picked up, whereas the motor carriers (and the rail and water carriers) are not permitted to engage in that forwarding practice. For motor carriers, the authorized practice is either to transport the freight all the way by themselves or to enter into through routes with motor, rail or water carriers under Section 216(c) of the Act (49 U.S.C. 316(c)).

Significantly, the Government in different portions of its brief refers in quite different and contradictory ways to what the motor carriers' activity would be under Rules 2 and 3. When it is discussing freight forwarding, it refers to the exemption for services performed "*as a carrier* subject to one of the other parts of the Act," and makes no mention

of the fact that here the motor carrier would be shipping goods and would be acting as a shipper (Govt. Br. 64). Elsewhere, however, when it is not discussing freight forwarding, the Government relies on the proposition that "when a carrier tenders goods *as a shipper,* it is entitled to the same treatment as any other *shipper*" (p. 31). Under Rules 2 and 3, if they were to go into effect, the motor carrier would indeed be a shipper; it would be acting "as a shipper," not as a carrier subject to Part II. The exemption in Section 402(a)(5) would be totally inapplicable; the motor carrier would be engaging directly in freight forwarding.

Rules 2 and 3 cannot be justified, as the Government attempts, on the ground that motor carriers should be permitted to use rail piggyback service under the railroads' tariffs because freight forwarders have the right to do so (Govt. Br. 65-66): It was Congress that expressly authorized freight forwarders to make shipments by rail (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). And, at the very same time, it was Congress that directed the Commission not to issue a freight-forwarding permit to any common carriers by motor, rail or water (49 U.S.C. 1010(c)). The "policy . . . of not permitting them to engage directly in the freight-forwarding business" is a policy of Congress. Motor carriers, acting as carriers under Part II, are authorized to engage in activities that are denied to freight forwarders, such as performing line-haul transportation by motor vehicle or entering into through route and joint rate arrangements, but one distinct function is assigned to freight forwarders by Congress and denied to motor carriers. That one function is the function of shipping the consolidated lot by rail, using the rail tariffs, or by other common carrier. If that one function were added to the authorized functions of a motor carrier—and Rules 2 and 3

would do so—the motor carrier would be engaging directly in freight forwarding.

It is no answer to say, as the Government does on page 66, that the motor carrier still would have to be prepared to perform highway service for anyone who demanded it. There is no indication in the legislative history that Congress thought that a motor carrier would go completely out of the motor carrier service if it were also permitted to engage in freight forwarding. To expand the motor carriers' activities to include freight forwarding does not necessarily mean that in other respects motor carriers would completely or even largely leave the highways. In all probability the motor carriers, becoming multi-service transportation agencies, would still continue to perform extensive motor carrier operations on many shipments even if Rules 2 and 3 became effective and they thereby received the additional right to engage in the freight-forwarding mode of operation. But it was that very mixture of modes of operation that Congress had in mind when it decided not to permit motor, rail and water carriers to engage in freight forwarding; "this policy will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, part II, or III were permitted" (see H. of R. Report, quoted p. 16, *ante*).

It is similarly no answer to say, as the Government does in its last sentence on page 66, that any "excessive embracing of piggyback service by a motor carrier would . . . expose it to severe sanctions that the Commission is fully prepared to apply." If a motor carrier actually does have a statutory right to operate by shipping goods by rail, by what authority can the Commission direct the motor carrier not to exercise that right beyond some undefined degree?

And if, on the contrary, the motor carrier mode of operation as authorized by Congress does not give it authority to operate by shipping the goods by rail, by what authority can the Commission undertake to permit a supposedly non-excessive use of that forbidden mode of operation? Nothing in the statute grants such authority to the Commission. Congress has not said motor carriers may be permitted to do some freight forwarding up to the point where it would somehow be deemed "excessive." On the contrary, the policy and the mandate from Congress are that motor carriers shall not be permitted to engage in freight forwarding, without exception for any limited amount of freight forwarding.

Rules 2 and 3, and the discussion in the Government brief, are concerned only with those rail tariffs and services that involve trailers on flatcars, rather than boxcars or other rail cars. No line of distinction, however, can be drawn under the Act between use of rail TOFC service and use of boxcar or other rail car service. In the words of the court below: "The trucker would be entitled to compel the railroads to carry not only the freight-laden trailer but bulk cargo and boxcar freight as well" (R. 28). Forwarders frequently utilize boxcar services of the railroads in conducting their forwarding operations. Section 402(a)(5)(C) authorizes forwarders to utilize "for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act" without regard to the nature of the particular services utilized (49 U.S.C. 1002(a)(5)(C)). No such provision appears in Part II of the Act, and Section 410(c), in forbidding the issuance of a freight-forwarder permit to a motor carrier, contains no exception that would allow such a permit to be issued if the motor carrier were restricted to the use of any one particular type of rail service.

Wholly apart from the terms of the Act or its legislative history, the Government urges approval of the rules on the ground that "the Commission's rules restore a competitive balance between them [the freight forwarders] and the motor carriers that had been disturbed by the preclusion of motor carriers from free access to piggyback service" (Govt. Br. 65). The Government states that issuance of the rules "merely restores motor carriers to a position of competitive equality with respect to *their* traditional business" (Govt. Br. 66; emphasis by Government). But to allow the motor carriers to act as freight forwarders would give them an entirely new authority that they have never had in the entire period since Parts II and IV of the Act became effective. The motor carriers would fully retain their own statutory and certificate authority to transport the goods all the way by public highways or to enter into through route and joint rate arrangements under Section 216(c) of Part II. Both of those rights would continue to be denied to freight forwarders. In addition to their own retained rights, however, the motor carriers would acquire the right to use the freight-forwarder mode of operation, shipping the goods by rail.

Far from producing equality, Rules 2 and 3 would place the motor carriers in an overwhelmingly dominant role in competition against the freight forwarders. The forwarders can offer competition by only one mode of operation, *i.e.*, shipping the goods rather than transporting them. If forwarders were to lose the protection that Congress has determined to be in the best interests of the public, *i.e.*, the protection that does not permit motor, rail or water carriers to act as freight forwarders, there could be little hope that forwarders could continue to offer competition against the motor carriers. The motor carriers already attract to themselves a huge quantity of the nation's freight shipments. In 1965 the gross revenues of the Class I intercity

motor carriers of property, as compared to those of the forwarders, were as follows:

1965 REVENUES*

Class I Intercity Motor Carriers	$7,097,213,149
Class A Freight Forwarders	$ 459,338,760

For every dollar of forwarder revenues, the motor carriers attracted more than fifteen dollars. If the motor carriers, by Rules 2 and 3, can get the right to operate in the only mode that forwarders have, while still retaining the full rights of operation under Part II that are forbidden to the forwarders, the handwriting is on the wall for the forwarders.

The probable consequences of the rules to the freight-forwarding industry were pointed out in the dissenting opinion of Commissioner Webb, who was then Vice Chairman of the Commission:

> "Since Rule 2 encompasses both Plan III and Plan IV TOFC service, it may very well destroy the freight forwarding industry.
>
> • • •
>
> "In short, Rule 2 would confer upon motor carriers all of the advantages flowing from the forwarder's status as a shipper but would impose none of the correlative disadvantages set forth in Part IV of the act.
>
> "No doubt the motor carrier industry would be pleased to capture the traffic presently being moved by freight forwarders. To the credit of the industry, however, it does not desire to capture that traffic in the manner proposed by the Commission." (322 I.C.C. at 394-395)

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* 80th Annual Report of I.C.C., 1966, pp. 170 (Table 34) and 180 (Table 56). Motor carrier revenues in 1965 were $3 *billion* more than in 1956 while the forwarders' increase was only $42 *million*.

Commissioner Webb's last sentence quoted above had reference to the frank statement in the oral argument of counsel for American Trucking Associations, Inc.:

> "I feel it incumbent upon me to state that the Regular Common Carrier Conference which I speak for also is of the view that *the motor carrier cannot use an open tariff*." (322 I.C.C. at 388, n. 7)

The representative of American Trucking Associations, Inc., testifying in 1963 regarding the proposal to amend the Act to enable motor carriers to make TOFC shipments, had endorsed the "objective" but criticized the proposal itself as "seriously defective," saying:

> "Among other things to be considered is the maintenance of carriers *as carriers* and not to dilute their position by forcing them into a behavior pattern which is basically shipper oriented. We earnestly desire an answer to this problem, but we feel that the solution should be one which treats carriers *as carriers*." Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H. R. 4700 and 4701, May 2, 1963, p. 213.

Despite these recognitions that a "motor carrier cannot use an open tariff" and that carriers should be treated "as carriers," the reaction of the motor carriers to the bonanza tendered them by the Commission under Rules 2 and 3 has been exactly what Commissioner Webb indicated it would be. They here argue in favor of those rules to allow a motor carrier to act as a shipper under TOFC tariffs. The motor carrier industry would indeed "be pleased to capture the traffic being presently moved by freight forwarders," but this would be done at the price to the public of loss of competition from the forwarders.

In its argument on this point, the Government errs in its statement of the facts and ruling in *Eastern Express*,

Inc. v. *United States,* 198 F. Supp. 256 (S.D. Ind.), affirmed, 369 U.S. 37 (Govt. Br. 65-66). Contrary to what the Government indicates, traditional traffic of forwarders has included volume ("trailerload") shipments, and in handling shipments by TOFC service (which was involved in that case) forwarders perform all of the functions that the Government brief here states are not performed. The Motion to Affirm, filed by the United States and the Commission in that case, is quite clear on this point. The Government *there* stated that both the Commission and the court below had found that volume rates were no "novelty in the forwarder industry"; "that forwarders have included numerous volume rates in their tariffs since shortly after the beginning of forwarder regulation in 1942 (J.S. 13a); that Congress was aware that forwarders were even then handling volume traffic when it enacted Part IV of the Act (J.S. 16a); and that in operating under these rates, forwarders would 'in the ordinary and usual course of their undertaking' perform all the assembly, consolidation, break-bulk and distribution services required of them by Section 402(a)(5) of the Act (J.S. 16a)." (Motion to Affirm, p. 7) The facts were detailed in the lower court's opinion in that case. Motor carriers and forwarders have long competed for shipments of various sizes, and still do although the motor carriers have been successful in obtaining the great proportion of the traffic. To add another competitive weapon to the arsenal of the motor carriers, by allowing them to operate in the freight-forwarder mode, would further accentuate the present inequality between truckers and forwarders, to the harm both of the forwarders and the public.

D. Arguments of ATA and NATA

American Trucking Associations, Inc. and National Automobile Transporters Association join in their brief to this

Court. Evidencing recognition that one who ships on a railroad tariff is indeed doing so as a "shipper," they say that the railroad's tariff "should be available to the traffic of all *shippers* whether originated by one carrier mode or another" (ATA-NATA Br. 16).

Like the Government, these motor carriers completely fail to mention the policy of Congress (expressed in the House Committee Report on the bill enacted as Part IV of the Act) against permitting common carriers by motor, water or rail to engage directly in the freight-forwarder business. They similarly fail to mention the statutory prohibition in Section 410(c) of Part IV against giving any freight-forwarding permit to such carriers.

Closing their eyes to that policy and mandate, the motor carriers urge that "there is nothing in part IV which carves out an exclusive manner of operation for freight forwarders . . . " (ATA-NATA Br. 34). On this concept that the freight-forwarding mode of operation was intended by Congress to be permitted to motor carriers, the Congressional policy and mandate would be rendered meaningless.

Most of the motor carriers' arguments are similar to ones advanced by the Government, but mention should be made of one point. The motor carriers apparently concede that if they confine their own service to assembly and consolidation, at the origin, and to separating the individual shipments ("break-bulk") and distributing those shipments to the consignees, at destination, they would not be operating as carriers subject to Part II and, instead, would be operating as freight forwarders (ATA-NATA Br. 33). We entirely agree.

But the motor carriers then argue that Rules 2 and 3 should nevertheless be approved because the motor carrier would be giving "proper notice to the public through its

tariffs" and because it would still have to be engaged in "continuous and adequate service" under its *motor carrier* certificate, with the Commission standing ready to prevent "a particular motor carrier's 'over-enthusiastic embracing of TOFC service' . . ." (ATA-NATA Br. 33-34).

There simply is no rational basis for this contention that a motor carrier, acting in the manner described above and shipping by rail TOFC for the line-haul transportation, would not be acting as a freight forwarder simply because, at the same time, it acts as a motor carrier to provide enough motor service to prevent revocation of its motor carrier certificate. The policy and mandate of Congress are that a motor carrier should not be permitted to engage in freight forwarding; and this necessarily assumes that the motor carrier so forbidden is and continues to be the holder of a valid motor carrier certificate. Preservation of motor carrier rights by, on some shipments, giving service of the motor vehicle type that is subject to Part II in no way qualifies or permits that motor carrier to engage in freight forwarding for other shipments.

A word about the status of *contract* carriers by motor vehicle may be appropriate at this point. The prohibition in Section 410(c) against issuance of a freight-forwarding permit to a common carrier by motor, rail or water does not apply to contract carriers. A contract carrier serves a limited number of patrons; it does not hold itself out to serve the public (49 U.S.C. 303(a)(15)). Congress has not permitted contract carriers by motor vehicle to make through routes or joint rates with railroads (322 I.C.C. at 350) or to act as shippers of their customers' goods. Although there is no prohibition against granting a freight-forwarding permit to such a carrier, any such grant could be made by the Commission only after the contract

carrier had made the application required in Section 410(b) and after the Commission had made the findings thereon that are required in Section 410(c). A total change of status would be required since all freight forwarders must hold out their services to the public (Section 402(a)(5)).

II. RULES 2 AND 3 WOULD PERMIT VIOLATIONS BY MOTOR CARRIERS OF THE TERMS AND PURPOSES OF PART II OF THE ACT

In the foregoing section we have shown that the new rules would permit motor carriers to engage in freight forwarding in violation of Part IV. As we shall demonstrate below, the activities that the rules would permit to motor carriers would also constitute violations of the terms and purposes of Part II of the Act.

The forwarders' concern with this latter issue has a two-fold derivation. One is that part of the shipments for which forwarders compete, and which they lose to motor carrier competition, are now transported over the highways as single shipments by the motor carriers, without consolidation with other shipments. Since freight forwarding involves consolidation by definition (Sec. 402(a)(5)(A)), no freight forwarding would be involved if the motor carrier, without consolidation, were to ship that individual shipment by rail, but such action of shipping by rail would be a violation of Part II of the Act. It also would be an injury to the freight forwarders to have the motor carriers provide competitive service of an unlawful kind. The second reason for the forwarders' concern with Part II is that on the shipments where freight forwarding by motor carriers would be involved, violating Part IV, the motor carriers would also be violating Part II.

As previously noted, Rules 2 and 3 would have a very severe competitive impact upon the forwarders from the

addition of a new mode of operation—freight forwarding—to the authorized mode of operation that is permitted by Congress to the giant motor carrier industry.

Furthermore, the rules would substantially harm both the freight forwarders and the shipping public in another way. Railroad publication of tariffs providing for Plans III and IV TOFC service is by no means universal on all railroads in this country or even on all parts of the particular railroads which have started such service. In considering whether to publish Plan III or Plan IV tariffs between points where the service has not yet been provided, a railroad executive (if Rules 2 and 3 were to go into effect) would have to take into consideration the fact that his road would be required to handle whatever traffic the competing motor carriers chose to ship. Considering both the strongly-felt competitive posture of railroads and motor carriers, and the fact that motor carriers would have an open invitation to balance their loaded highway movement in both directions by burdening the railroads with imbalances of traffic, such a railroad could be expected to be loath to publish new Plan III or Plan IV tariffs. In the words of the Government brief: "A railroad may, if it wishes, *forego piggyback open tariffs altogether*—in which event it will not be in violation of the Commission's rules" (Govt. Br. 23, 60). Moreover, the rates, if published, probably would have to be set at a higher level to cover the added expense of handling the more burdensome traffic that the motor carriers would shift to the railroads under those tariffs. The freight forwarders and their patrons in the shipping public, as well as the many private shippers who use TOFC, would be harmed by any railroad decision not to expand Plan III and Plan IV service to new areas. They would also be harmed by having to pay higher rates, under Plans in effect now or in the future, where the increase in

rates is due either to the added expense of handling shipments made by the motor carriers or to the reluctance of a railroad to provide low rates for use by its motor carrier competitors.

For all of these reasons, the forwarders have a definite interest in the question of whether Rules 2 and 3 would permit motor carriers to violate the provisions of Part II of the Act. We submit that the lower court was correct in its unanimous decision that the rules are unlawful under Part II as well as under Part IV.

A. The Interstate Commerce Act Does Not Permit a "Carrier by Motor Vehicle" to Perform Its Authorized Transportation Service by Shipping by Railroad

1. Transportation Service Authorized for Motor Carriers by Part II

The Commission held in this case, as it had previously and consistently, "that 'trailer-on-flatcar transportation is in fact transportation *by railroad,*'" regardless of who owns or ships the trailers (322 I.C.C. at 343).* The ATA-NATA contention to the contrary is made without mention of this explicit and clearly correct finding by the Commission in this case (ATA-NATA Br. 21-22).

Rules 2 and 3 purport to authorize carriers by motor vehicle to provide railroad transportation from origin to destination and to do so for the performance of "all or any portion of their authorized service." The terms of Part II

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* "In the *New Haven* case [*Movement of Highway Trailers by Rail,* 293 I.C.C. 93], it was found, *properly we think,* that 'trailer-on-flatcar transportation is in fact transportation by railroad,' and that 'this is so whether the trailers are owned or operated by railroads, shippers, or motor common carriers' " (322 I.C.C. at 343).

of the Act, under which motor carriers are protected and regulated, make it abundantly clear, however, that the operations of those carriers are to be by motor vehicle and over public highways. Such carriers are not authorized to transport or provide transportation by rail or by any mode other than as carriers by motor vehicle over public highways.

The statutory definitions in Part II reveal the type of transportation agency and service that Congress authorized and contemplated. They evidence the intent of Congress that the operations of carriers under Part II are to be operations *by motor vehicle* and not by rail or as shippers by rail. Section 203(a)(14) reads as follows:

> "The term *'common carrier by motor vehicle'* means any person which holds itself out to the general public to engage in the transportation *by motor vehicle* in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . ." (49 U.S.C. 303 (a)(14))

Item 15 reads:

> "The term *'contract carrier by motor vehicle'* means any person which engages in transportation *by motor vehicle* of passengers or property in interstate or foreign commerce . . . under continuing contracts with one person or a limited number of persons . . ." (49 U.S.C. 303(a)(15))

Section 203(c) shows the restricted and protected scope of the activities regulated and authorized by Part II. The section provides that, with three specified exceptions which are not pertinent here, "no person shall engage in any for-hire transportation business *by motor vehicle*, in interstate or foreign commerce, *on any public highway* or within any reservation under the exclusive jurisdiction of

the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing *such* transportation . . . " (49 U.S.C. 303(c)).

The statutory provisions for application to the I.C.C. for certificates of public convenience and necessity similarly emphasize that the operations with which Part II is concerned are those operations which are by motor vehicle over public highways. Section 206(a)(1) provides that "no common carrier *by motor vehicle* subject to the provisions of this part shall engage in any interstate or foreign operation *on any public highway* . . ." without a certificate "authorizing *such* operations" (49 U.S.C. 306(a)(1)).

Nowhere does Congress provide for or permit an operation by a motor carrier as a shipper by rail. Nowhere does it provide for or permit an operation other than "by motor vehicle" and "over public highways." Nowhere does it provide for or permit the transformation of a licensed motor carrier into a multi-service transportation agency unilaterally providing shipment by rail in addition to the services specified in Part II.

Even when the operation is by motor vehicle and over public highways, Congress does not permit the Commission to authorize regular or general or frequent deviations from the particular highway routes specified in the motor carrier certificates; permission to "occasionally deviate" from the specified route is the most that Congress has permitted the Commission to grant (49 U.S.C. 308(b)). Rules 2 and 3, however, would permit regular deviations to rail routes from the specified highways.

Congress clearly intended to provide a comprehensive framework establishing carefully balanced relationships among the several modes of transportation. This is shown

both by the certificate or permit requirements mentioned above and also by the statutory sections providing for intermodal service coordinations and for tariffs.

Congress made its own provisions for common carriers by motor vehicle and common carriers by rail to act in conjunction or coordination with each other in providing transportation service to the public. Those provisions do not include any rail-motor service other than through the establishment of through routes and joint rates. And Congress has deliberately provided that the making of through routes involving a railroad and a motor carrier is voluntary on the part of both carriers concerned. The permission for the voluntary through routes is set out in Section 216(c) (49 U.S.C 316(c)). The Commission here recognized that "we are without statutory power directly to require the establishment of through motor or motor-rail routes" (322 I.C.C. at 334). Neither has Congress granted any permission or made any provision for the type of service that Rules 2 and 3 would order into effect.

Appellants do not and cannot suggest that Rules 2 and 3 have a basis in or are made lawful by Section 216(c). Instead the effort is to show that motor carriers may somehow be authorized to ship by rail and that this newly conceived authority is not inconsistent with the terms and purposes of Section 216(c) and the other provisions of Part II. However, the terms of Part II show that no service as a shipper by rail was intended for motor carriers. Moreover, the general policy arguments advanced by the Government to support the type of service that the new rules would create directly conflict with the basis of Section 216(c), which is the only statutory authority for motor-rail coordinations.

For example, the Government argues that it is anti-competitive, unlawfully discriminatory, etc., for railroads

to enter into a coordinated route arrangement on varying terms with different motor carriers or to make such arrangements with fewer than all motor carriers (Govt. Br. 43-45). Focusing on only one type of party to the voluntary arrangements, the Government complains of "discrimination *among* motor carriers" by railroads (Govt. Br. 45; emphasis by Government). Mutual selection, however, is the essence of the voluntary arrangements provided for by Congress in Section 216 (c). Moreover, Section 3(4) of the Act, which prohibits discrimination between certain connecting carriers, does not include rail-motor interchanges. Thus the Government's general policy arguments ignore the fact that Section 216(c) is the only source of authority for motor-rail arrangements and also attack as anti-competitively discriminatory the Congressional policy in Section 216(c)—a policy also reflected in Section 3(4)—authorizing the specified coordinations on a voluntary ("may") basis.

The tariff provisions of Part II of the Act establish the tariffs that a motor carrier is authorized and required to file. Those tariffs are either for transportation by the motor carrier (and TOFC is held in the Commission report to be transportation by railroad rather than by motor carrier)* or for transportation by both a motor carrier and a rail or other form of carrier "when a through route and joint rate shall have been established" (49 U.S.C. 317(c)). Section 217(d) provides that "No common carrier by motor vehicle, unless otherwise provided by this part [under exceptions not here pertinent], shall engage in the transportation of passengers or property unless the rates, fares and charges upon which the same are *transported by said carrier* have been filed and published . . ." (49 U.S.C. 317(c)). Section 217(a) provides that "Every common carrier by

* See p. 39 and accompanying note, *ante*.

motor vehicle shall file . . . tariffs showing all the rates, fares, and charges for transportation . . . between points on its own route . . . or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established" (49 U.S.C. 317(a)). The provision for tariffs covering rates "for transportation" in that part of the section refers to the same thing that is described in the prohibition above quoted from subsection (d), namely, rates upon which the passengers or property "are transported *by said carrier.*" A carrier of passengers by motor vehicle is not to perform its service by buying tickets for the passengers in a train running between points that the motor carrier is authorized to serve by motor vehicle. Neither is a carrier by motor vehicle to provide rail transportation by piggyback or otherwise between such points.

The plain statutory provisions and intent are that carriers "by motor vehicle" are to provide their service by motor vehicle and over public highways. These provisions constitute, as the three-judge District Court unanimously held, "the fundamental limit . . . prohibiting the carrier from performing its transportation services through a mode not within its authorization . . ." (R. 34-35). Congress did not authorize motor carriers to accept freight from the public and then send it to the destination by whatever means and by whatever routes they see fit to use—whether by rail, by water or by private highway. Their authority, as carriers under Part II, is to transport by motor vehicle over public highways and, even then, with only occasional deviation from authorized highway routes specified in their certificates or permits. Their only other authority is to participate in through routes and joint rates pursuant to Section 216(c).

The authority of the "common carrier *by water*" and of the "contract carrier *by water*" is similarly circumscribed in Part III of the Act. This, again, reflects the statutory scheme of maintaining separate classes of carriers grouped according to the physical means by which the line-haul transportation service is provided. The terms quoted above are defined in Section 302(d) and (e) (49 U.S.C. 902(d) and (e)). The other provisions of Part III also stress that the transportation authorized thereunder is transportation "by water," except with respect to through routes and joint rates. Unlike the situation regarding motor carriers, the water common carriers and railroads have a statutory duty to establish reasonable through routes with each other (49 U.S.C. 1(4) and 905(b)). The duty may be enforced by the Commission but only after a "full hearing" and subject to certain specified standards (49 U.S.C. 15(3) and (4) and 907(d)). (See opinion of the District Court, R. 34, n. 21.) Nothing in Part III provides for the substitution by a water carrier of service by a railroad, whether piggyback or otherwise, and nothing in that Part or in Part II permits either a carrier by water or a carrier by motor vehicle to provide rail transportation through a method of shipping the freight by rail.

2. Interpretations of the Act Here Found by the Commission to Have Been "Sound Conclusions" When Made

The three-judge District Court first reviewed the issues of statutory interpretation raised by the promulgation of Rules 2 and 3 and concluded that the rules violated the Act when viewed "as a matter of first impression" even without consideration of the previous decisions (R. 37). That holding, as the court stated, is "supported and confirmed by the consistent and repeated decisions of the Commission

and the courts." (R. 37). Contrary to the appellants' suggestion, the court below certainly did not conclude and no appellee has implied that it is generally or presumably "beyond the power of the Commission to disturb" its prior decisions (Govt. Br. 56; ATA-NATA Br. 36).* The court did hold—and properly so—that the previous decisions were correct and that the Commission erred in the present case.

Before issuing the rules involved in this case, the Commission had long recognized that the Act prohibited rail shipments by common or contract motor carriers and obligated railroads not to participate in a violation of the Act by accepting shipments from such motor carriers. The previous decisions which the Commission here approves as having *"represented sound conclusions" "when made"* (322 I.C.C. at 334)—but which the Commission would now overrule for the future—were based squarely upon the Interstate Commerce Act itself. They were not based upon any theory of administrative policy or discretion. And operations which the Commission in previous decisions declared to be in violation of the Act were the same kind of operations which the Commission would now permit to the motor carriers and require of the railroads.

One of the most notable of those decisions was entitled *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), in which the Commission, after full consideration, made a declaratory order under Section 5(d) of the Administrative Procedure Act (5 U.S.C. 1004(d)). The case

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* Considering both relevant agency and judicial interpretations, the District Court ruled that: "In the face of [the] settled interpretation of the Act by the Commission itself as well as by the courts, the *deference* ordinarily due to the construction of the Act by the administrative agency responsible for its enforcement is not called for" (R. 40).

is known more generally as the *New Haven* case since it was initiated by certain inquiries from that railroad. The Commission, after preliminary steps, "issued a notice setting forth 12 basic and fundamental questions involved in the movement of trailers on flatcars, invited interested parties to submit briefs thereon, and assigned the proceeding for oral argument, which was held on June 28 and 29, 1954" (293 I.C.C. at 94).

Early in that report the Commission summarized certain statutory provisions of Part II of the Act which we have described above and which confine motor carriers to "operations by motor vehicle" and "over public highways."*

Two questions in the *New Haven* proceeding were directly concerned with the issues here:

> "*Question 3.*—May a railroad, under provisions of tariffs duly published and filed by it, but without holding any authority under part II, transport freight-laden trailers on flatcars, the trailers having a prior and/or subsequent highway movement: (a) by private carrier by motor vehicle; (b) by contract carrier by motor vehicle?" (*Id.* at 103)
>
> "*Question 4.*—Under the conditions stated in question 3, may a railroad transport such trailers if the prior and/or subsequent highway movement is by a common carrier by motor vehicle? If so, to what extent must the railroad ascertain and be subject to the limitations in the motor common carrier's certificate as to (a) territory and (b) commodities?" (*Id.* at 104)

Regarding question 4, involving common carriers by motor vehicle, the Commission, in accordance with numerous previous decisions, held that the Interstate Commerce Act

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* These provisions, in the order of the Commission's reference, were Sections 206(a)(1), 203(a)(14), 203(a)(13), and 203(a)(12) (293 I.C.C. at 98-99).

prohibits a motor carrier from acting as a common carrier by motor vehicle and as a shipper by rail in regard to the same service and that therefore a railroad which knowingly accepts such a shipment from a common carrier by motor vehicle would be joining the motor carrier in a violation of the law. The Commission, referring to a case involving a tariff filed before the effective date of Part II of the Act and then to cases after the effective date of Part II,* stated:

> "This question, like number 3, is to be answered against the background of an open tariff published by the railroad naming rates open to the general public and applicable on freight-laden highway trailers to be transported by the railroad on flatcars. In *Trucks on Flat Cars between Chicago and Twin Cities* [216 I.C.C. 435], we found such an arrangement to be lawful. The motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to that portion of it performed by the railroad.
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> "Three years later, in *Substituted Freight Service,* 232 I.C.C. 683, 690, we again adverted to this principle and rejected it, observing that *for the motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act.* See also *Motor-Rail-Motor Traffic in East and Midwest,* [219 I.C.C. 245], page 247. *The view so stated is obviously sound.* It follows, therefore, that if the railroad is on notice that trailers tendered it in this manner are being operated in common-carrier

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* In *Motor-Rail-Motor Traffic in East and Midwest,* 219 I.C.C. 245, 247 (November 17, 1936), the Commission had pointed out that: "The tariff there approved [in *Trucks on Flat Cars Between Chicago and Twin Cities,* 216 I.C.C. 435 (June 20, 1936)], which became effective July 7, 1936, was filed prior to the date on which the provisions of the Motor Carrier Act relating to the filing of tariffs became effective."

> service subject to part II of the act, *it should not thus knowingly join with the motor common carrier in a violation of the law.* It should be understood that what has just been said refers only to traffic moving by rail under an open tariff and in the absence of a through-route arrangement between the connecting carriers." (293 I.C.C. at 104-105)

Regarding the part of question 3 involving contract carriers by motor vehicle, the Commission similarly held that a contract carrier may not utilize TOFC service within the scope of its permit from the I.C.C. The report stated:

> "*. . . a contract carrier may not utilize trailer-on-flatcar service to obtain transportation within the scope of its (the contract carrier's) permit.* For example, a contract carrier of specified commodities, authorized to perform such transportation from Portsmouth, N.H., to New York over a route through Boston, could not lawfully divert his vehicle at Boston to trailer-on-flatcar service between that point and New York." *(Id.* at 104)

The Commission went on to state that although a railroad is not required to police the actions of motor carriers, the railroad should not "knowingly join with the contract carrier in perpetrating a violation of the law" (*Ibid.*). The railroad's duty would be to decline to accept such a shipment made by a contract carrier as consignor.

After answering the other questions before it, the Commission concluded, in part, as follows:

> "The conclusions reached and stated herein will enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental legal principles pertaining thereto." *(Id.* at 111)

The subsequent expansion of the already large piggyback operations has been based on those principles (322 I.C.C. at

310), principles that were derived directly from the requirements of the Interstate Commerce Act rather than from any idea of discretion in the Commission.

In 1938, two years after Part II of the Interstate Commerce Act became effective, the Commission instituted an investigation into the lawfulness of the practices of rail, motor and water carriers in regard to the substitution by one carrier of the services of another carrier. This case is referred to in the quotation above and generally as *Substituted Freight Service,* 232 I.C.C. 683 (1939); its full title, indicative of its scope, was *In the Matter of Substitution of Motor Vehicle Service for Rail or Water Service and of Rail or Water Service for Motor Vehicle Service.* All common carriers by rail or water and all common or contract carriers by motor vehicle were made parties.

The report in that proceeding indicated that: (1) certain railroads were utilizing to some extent contract carriers by motor vehicle in the movement of railroad freight and, (2) at least one common motor carrier was utilizing rail service between its authorized motor carrier service points. After discussing "the certificate and tariff provisions" of the recently enacted Part II (*id.* at 684-686), the Commission said:

> *"The principal issue in the instant proceeding is one of law, namely, whether the present operations can as a permanent proposition be made to square with part II, particularly the certificate and tariff provisions thereof."** (*Id.* at 686)

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* Similarly the report stated that "questions 2 to 6 raise questions of law whether and how the service can be squared with part II" (232 I.C.C. at 685). Earlier after outlining the specific provisions of that Part, it was said: "These provisions of part II, so far as they apply to common carriers, are hereinafter referred to as the certificate and tariff provisions" (*Id.* at 684).

Despite that report's discussion of specific sections and purposes of Part II, capped with the statement of the basic legal issue under the new statute, the Commission report in the present case and the appellants' arguments here misleadingly and erroneously assert that the relevant holdings were dicta uttered with "no statutory . . . basis suggested" (Govt. Br. 55) and "without explanation or supporting precedent" (322 I.C.C. at 332; Govt. Br. 55; ATA-NATA Br. 35).

As noted above, one aspect of this 1939 *Substituted Freight Service* case involved certain railroads utilizing contract carriers by motor vehicle in the movement of railroad freight. Those railroads urged that they could do so in the capacity of being shippers as between themselves and the contract motor carriers. The Commission rejected the alleged right. It stated:

> "The situation of the eastern rail carriers and of the St. Louis Southwestern Railway Company is different in that they utilize to some extent so-called contract carriers by motor vehicle in this service. They are *the rail carriers who urge that they are shippers* in relation to such contract motor carriers and that neither they nor such contract carriers are or should be required to act as common carriers by motor vehicle in their relation to the public. *But they cannot act as common carriers by rail and shippers by motor vehicle as to identically the same service.*" (232 I.C.C. at 688)

The Commission in *Substituted Freight Service* then turned to "the reverse situation," *i.e.*, the substitution of rail for motor carrier service. With the same statutory principles, it stated:

> "The only specific instance referred to at the oral argument of substitution of rail service for motor-carrier service is in connection with Consolidated, which

on transcontinental traffic substitutes for its service between Minneapolis, Minn., and Terry, Mont., the service of the Chicago, Milwaukee, St. Paul and Pacific Railway Company, on account of load restrictions within the State of North Dakota. *It appears that between these points it acts as a forwarder or shipper* and assembles the traffic tendered by the individual shippers into carload lots, paying the railroad the carload rate between Minneapolis and Terry and assessing the individual shipper or consignee its less-than-truckload rate between primary origin and destination. *But for it to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is just as repugnant to the act as the reverse situation of the eastern rail carriers, although in this instance it appears that it actually has common-carrier rights between Minneapolis and Terry** .... If Consolidated or other motor and water carriers desire to continue this service, they should bring the service into conformity with the tariff provisions of the act in accordance with the views expressed herein." (*Id.* at 690)

The "tariff provisions in the act," referred to in the foregoing quotation, are Sections 6(1), 217(a) and 306(a) (49 U.S.C 6(1), 317(a) and 906(a)), which require railroads, motor carriers and water carriers to file and publish tariffs showing all of their rates, fares, and charges. As previously noted in our discussion of Section 217(a), tariff provisions in the Act require that in the case of a through route and

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* Footnote by I.C.C.: "In *Trucks on Flat Cars Between Chicago and Twin Cities*, 216 I.C.C. 435, we found proposed schedules justified wherein the motor carrier was said to have the status of a common carrier as to the entire haul and the status of a shipper as to part thereof. However, schedules providing for joint motor-rail-motor rates were subsequently proposed and found justified for this service in *Motor-Rail-Motor Traffic in East and Midwest*, 219 I.C.C. 245." See opinion of the District Court in the present case, R. 37.

joint rate each carrier publishing the rate must show in its tariff the rate between points on its own route and points on the route of any other carrier. In deciding the *Substituted Freight Service* case, the Commission expressed certain views as to how the carriers might bring the service into conformity with these tariff provisions. Regardless of the publication form that carriers might choose in complying with such tariff provisions, the Commission expressly found that the applicable rate tariff should show "appropriate concurrences" of each carrier participating in the service *(Id.* at 689, last paragraph).

Thus the Commission held that if a rail carrier originated a shipment, and wished to turn the traffic over to a motor carrier for a part of the haul, it would have to publish a tariff showing the through route and obtain a "concurrence" from the motor carrier involved, which the motor carrier could issue or refuse to issue. Similarly, it held that if a motor carrier wished to turn his shipments over to a railroad for a portion of a haul, the motor carrier would have to obtain the voluntary concurrence of the railroad in its tariff. Neither the railroad nor the motor carrier could simply publish in its tariff its intent to turn the traffic over to another carrier and act as a shipper over such other carrier.*

The Commission's report in the present case questions whether the Commission in the *Substituted Freight Service* case of 1939 intended to proscribe what its language had so forcefully condemned as being in violation of Part II of the

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* As stated by the court below in the present case:
"Although the [*Substituted Freight Service*] decision emphasizes the necessity for publication of tariffs disclosing the manner of carriage, it also requires that such tariffs be published with the concurrence of the railroad." (R. 38)

Act, with regard to a carrier which acts both as a carrier and as a shipper in respect to the same service. The Commission admitted, however, that in decisions made by it in the 1940's and 1950's it had so understood the principles and holdings of that 1939 case (322 I.C.C. at 334).

The points urged to distinguish the *Substituted Freight Service* case do not comport with the facts of that case. The present Commission report suggests that the controlling principles might apply "were a carrier to tender a shipment to another carrier for transportation to a point it [the first carrier] cannot serve" (322 I.C.C. at 333), thus leaving open the situation where the transportation by the second carrier is between points that the first carrier would be authorized to serve. That comment, however, fails to note that the particular motor carrier operation of shipping by rail that was condemned in the 1939 case was one where the motor carrier doing the shipping "actually has common-carrier rights between Minneapolis and Terry," which were the points involved (232 I.C.C. at 690).

Also inconsistent with the 1939 rulings are the Commission's other "distinguishing" comments suggesting that the action of the motor carrier in shipping by rail might not violate the Act if notice of that intention were first given to the original shipper (322 I.C.C. at 332-334). Those comments overlook the fact, discussed above, that the 1939 decision required not only a notice but also the filing of voluntary "appropriate concurrences" by any carrier whose service was to be substituted for the service of the initial carrier (232 I.C.C. at 689 (last paragraph), 690). Appellants obscure this by describing the 1939 case as "merely" holding the tariffs in question "legally insufficient" and requiring "lawfully filed tariffs" (322 I.C.C. at 332; Govt. Br. 55, n. 33; ATA-NATA Br. 36). But the Commission in 1939 clearly held that to be sufficient and lawful under

the statute any such tariffs must at least include concurrences. No concurrences are involved in the proposed Rules 2 and 3; indeed, at one point the ATA and NATA acknowledge, as they must, that "motor carrier use of the open-tariff rules would be the *unilateral* substitution by the motor carrier of trailer-on-flatcar transportation for all or a portion of the highway movement" (ATA-NATA Br. 32).

The statutory principles described in the *Substituted Freight Service* case were admittedly and repeatedly reaffirmed and applied by the Commission.* Its present report correctly recognizes (322 I.C.C. at 334) that this is true of its decisions "including": *Ringsby Truck Lines,*

* The same statutory analysis has consistently guided the courts. As the District Court noted, one facet of the analysis includes the rule that: "a person who engages in transporting goods for the general public by using open-tariff service of common carriers is not himself engaged as a common carrier by motor vehicle, so as to be entitled to a certificate of public convenience and necessity under the 'grandfather' provisions of the Act. *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (D.C. N.Y. 1940), aff'd p.c. 309 U.S. 638; *Ready Truck Lines, Inc.* v. *United States,* 42 F. Supp. 970 (N.D. Ill. 1941), affirmed 314 U.S. 580. *The relevant premise of the decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad."* (R. 38-39). See also *United States* v. *Maher,* 307 U.S. 148, 155-156 (1939); *Andrews Van Lines, Inc.* v. *United States,* 240 F. Supp. 763 (D. Neb. 1965), affirmed per curiam 382 U.S. 67 (in which the Government's Motion to Affirm (pp. 4-5) also recognized that *"Plainly the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle"); Consolidated Freightways, Inc.* v. *United States,* 136 F.2d 921 (C.A. 8, 1943), certiorari denied, 320 U.S. 781; *Moore* v. *United States,* 41 F. Supp. 786 (D. Minn. 1941), affirmed per curiam 316 U.S. 642; *Kline v. United States,* 41 F. Supp. 577 (D. Neb. 1941).

Inc. v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141-142 (1945); *Savage Application*, 265 I.C.C. 157, 167 (1947); *Movement of Highway Trailers by Rail* [*New Haven* case], 293 I.C.C. 93 (1954).

As if to dilute the unbroken and long line of cases based on the Act, the Commission added that it nonetheless believed two of its cases "are consistent with our present interpretation of *Substituted Freight Service*. . . ." (322 I.C.C. at 334). The Commission offered no explanation of the supposed consistency of either case with its present interpretation and neither citation is referred to or discussed in this Court in the supporting briefs of the Government and the ATA-NATA. Both of the two cases were in fact direct decisions that it is a violation of the Act for a motor carrier to act as a shipper of its customers' freight.

In the first of those two cases cited in the report, *Greer Broker Application*, 23 M.C.C. 417 (1940), a motor common carrier stated that he was shipping some of his customers' freight over other common carriers. He sought a broker's license from the Commission for that activity. The Commission not only denied the license but also condemned the motor carrier's practice of shipping over other carriers. Moreover, the Commission there demonstrated the patent invalidity of the present assertion that the 1939 *Substituted Freight Service* decision was rendered without explanation or explicit statutory basis.* Thus the 1940 Commission report observed that:

> "In *Substituted Freight Service*, 232 I.C.C. 683, the Commission had under consideration, among other matters, a situation where a motor carrier accepted

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* See pp. 50-51, *ante*.

traffic for transportation from origin to destination as a common carrier at its own rates and, as to a portion of the route of the shipment, substituted the service of a rail carrier for its own service, paying for such substituted service the tariff rates assessed by the rail carrier. *This practice was stated by the Commission to be repugnant to the act, more particularly to sections 202(a), 206, 207, 208, 216, 217, and 219 thereof.* In the situation here presented, the substituted carrier is another motor carrier and the substitution is as to the entire transportation rather than a portion of it. *In our opinion, the practice of applicant as disclosed in this proceeding cannot be approved, for reasons similar to those set forth by the Commission."* (23 M.C.C. at 420)

In the second case, *Stone's Express, Inc., Common Carrier Application,* 32 M.C.C. 525 (1942), the evidence showed that an applicant for motor carrier rights under the "grandfather" clause of Part II had been shipping part of its freight by rail between New York and Boston. Although the report conditionally approved the application,* it admonished the applicant concerning that rail service activity, saying:

"Thus applicant, in effect, is acting as a common carrier by motor vehicle and a shipper by rail as to the same traffic, a situation which is repugnant to the provisions of the act. If applicant desires to continue

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* Significantly in this regard, in addition to the rail transportation the report also found that "continuously since" 1935 the applicant had been engaged in "regular-route operations" "as a common carrier by motor vehicle" between New York and Boston over highways specified in the report's appendix (32 M.C.C. at 526-529). The fact that the motor carrier had been continuously performing actual highway service on part of the shipments did not save it from condemnation for violating the Act by shipping other shipments by rail.

> to substitute rail service in lieu of its own motor-vehicle operation between New York and Boston, or between any points served by it as a motor carrier, it should bring such service into conformity with the tariff provisions of the act in accordance with the views expressed in *Substituted Freight Service*, 232 I.C.C. 683." (32 M.C.C. at 527)

Although the present report cited this as the other case allegedly "consistent with" its new interpretation, earlier the Commission had properly and expressly acknowledged that *Stone's Express* case had "adhered to" the principle that for a motor carrier to act as a common carrier by motor vehicle and a shipper by rail as to the same traffic is "repugnant to the provisions of the act." *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 139, 141-142 (1945). In short, that understanding of the Act had been in full effect for at least twenty-five years prior to the Commission's report in this case and had been expressly followed even in the only two cases that the Commission report here suggested might not directly contradict its new comments on the 1939 interpretation.

The Interstate Commerce Act itself remains unchanged in any pertinent respect since the Commission's original and repeated decisions were made. Those decisions were expressly based on the Act and not on a notion implicit or otherwise of discretion in the Commission. The report in the present case expressly states that those decisions "represented sound conclusions" when they were made (322 I.C.C at 334). Yet Rules 2 and 3 would now permit the carriers by motor vehicle and the carriers by water to ship the goods of their customers by rail—precisely the action and type of activity that those previous decisions recognized as being prohibited by the statute.

B. Sections 2 and 3 of Part I and the So-called "Rule of Equality"

Appellants devote much of their briefs to arguing in various ways that Rules 2 and 3 are justified and lawful on the basis of a so-called "rule of equality." Despite the professed objective, however, Rules 2 and 3 clearly would not produce equality between motor carriers and shippers or freight forwarders, and the rules cannot be justified on that basis. The gross inequalities under Rules 2 and 3 show the basic irrelevance of the so-called "rule of equality" to the issues of this case.

One reason why the rules would not produce equality is plain on the face of the Government's brief. The Government assures the Court that "the antidiscrimination provisions of the Act . . . can be fully complied with by discontinuing open-tariff piggyback services" (Govt. Br. 60). This would completely deprive private shippers and freight forwarders of any TOFC service. TOFC Plans II, III and IV, the only plans they can use, would be dead. But discontinuance of all or any open-tariff TOFC service would have no effect whatsoever on Plans I and V, and these are the Plans in which the motor carriers now participate. Plan V tariffs are clearly lawful under the terms of Section 216(c) of Part II of the Act, which provides for voluntary motor-rail through routes and joint rates. Plan I was held lawful by the Commission in this proceeding as also coming within the terms of Section 216(c) (322 I.C.C. at 349) and the Government is defending that ruling in another case.* In a decision made in 1962, the Commission said that "the physical rail transportation service provided by the railroads in Plans I, III, and V, is identical." *National Automobile Transporters Association Petition for Declar-*

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* *Lone Star Package Car Co.* v. *United States*, Civil Action No. 4-355 (N.D. Tex.).

atory Order, 91 M.C.C. 395, 412. In "fully" complying with the new Rules 2 and 3, as the Government suggests, by discontinuing open-tariff piggyback service, the railroads could exclude all private shippers and freight forwarders from TOFC service and such compliance would leave the motor carriers entirely free to participate in the motor-rail service that is authorized by Section 216(c). The result certainly would not be equality in TOFC between motor carriers and private shippers or freight forwarders. The only equality, in those circumstances, would be between the private shippers and the freight forwarders; none of them would be able to ship by piggyback.

Compliance with Rules 2 and 3 by total abandonment of the Plan II, III and IV tariffs might not be expected, but there might well be selected abandonments and also a serious deterrence to establishing new open-tariff TOFC service between points where it does not now exist (see pp. 38-39, *ante*).

Even if there were no abandonments there still would be no "rule of equality" to provide equal treatment for private shippers and forwarders as compared to motor carriers. Under a through route and joint rate arrangement made between a railroad and a motor carrier pursuant to Section 216(c), the total amounts paid by the shippers are divided and each carrier receives a "division." These divisions are privately negotiated between the railroad and the motor carrier. The Commission here did not even initially propose a rule to provide equality between the amount received by a railroad from a motor carrier as a division and the amount the railroad would receive from a private shipper or freight forwarder as a tariff rate. The Commission did initially propose a rule to require "that the divisions received by a rail carrier providing joint intermodal

service could not *exceed* any all-rail TOFC rate maintained by the rail carrier for like services" (322 I.C.C. at 328). It finally concluded, however, that:

> "We do not believe that it would be practical to attempt to control by a rule of general applicability the level of compensation to be received under division agreements which are, by nature, private contracts negotiated by individual carriers." (*Ibid.*)

Thus, if Rules 2 and 3 were in effect, a motor carrier could ship its customers' goods under a rail TOFC tariff, paying the tariff rates, *or*, if the motor carrier had made a Section 216(c) arrangement with the railroad providing for a "division" to the railroad in an amount lower than the tariff rate, the motor carrier would be free to obtain that more favorable treatment.* No freight forwarder or private shipper, however, is permitted by the Act to make such an arrangement; they must pay tariff rates, regardless of lack of equality with the motor carriers. If a railroad, by a private contract negotiated with a freight forwarder or private shipper, were to agree to accept a lower amount than the tariff rate, both parties would be criminally liable under the rebate provisions of the Act.

In short, justification for rules that would permit motor carriers to act as shippers cannot be found in any rule of equality. Contrary to appellants' arguments, no equality would result among motor carriers, private shippers and freight forwarders with respect to TOFC service. There will be instances where motor carriers can participate in

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* For example, the amounts received by the Pennsylvania Railroad on Plan I TOFC (an arrangement held by the Commission to be a through route under Section 216(c) despite the forwarders' arguments to the contrary) "are in every instance materially lower than" that railroad's tariff rates to the public under Plan III tariffs (R. 382-3).

TOFC service while no TOFC service at all will be available to forwarders and private shippers. And, where the TOFC service is provided by tariff (Plans II, III and IV), motor carriers still would have the right to enter into more favorable arrangements with any willing railroad as an alternative to using the tariff TOFC service and paying the tariff rates that forwarders must pay. As Vice Chairman Webb observed, "Although Rule 2 is apparently designed to place motor carriers in a position of equality with forwarders in the use of all-rail TOFC service, a greater regulatory inequality would be hard to imagine" (*Id.* at 395).

The Commission report, in discussing Rules 2 and 3, referred to only one antidiscrimination section, namely, Section 2 (322 I.C.C. at 335). That section is concerned solely with rates (49 U.S.C. 2). It is wholly irrelevant here, where there is no claim that the railroads charge a higher rate to one shipper than to another. If the Commission had in mind that rail charges or "divisions" under Section 216(c) are at levels different from the tariff rates, that situation is still irrelevant with regard to Rules 2 and 3 since it is produced by the terms and purposes of Section 216(c) and would continue unaffected by the rules.

The reference in the Commission's report to Section 2 is accompanied by the citation of two cases (322 I.C.C. at 336). Neither case is in any way relevant to Rules 2 and 3. One case held that a railroad could not transport another railroad's private passenger cars at a lower rate than the rate charged for hauling private cars owned by individuals. *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740 (1931).* The case in no way concerned the performance

* The companion case involving the same orders was *Kansas City S. Ry.* v. *United States,* 282 U.S. 760. A similar case is *I.C.C.* v *Baltimore & O. R.R.,* 225 U.S. 326 (railroad fuel).

by one carrier of its transportation obligations by shipping over the lines of another carrier. A carrier asking other carriers to transport its own goods or supplies and not those of its customers has offered no transportation services to the public and receives no payment for actual or purported carrier services with respect to the movement. It is lawfully acting as a shipper.

The other case cited in the report held that a railroad, because of the rebate provisions of the Act, could not make unlawfully large and discriminatory allowances to certain shippers. *Warehouse Co.* v. *United States,* 283 U.S. 501 (1931). Appellants do not refer to that case; it is patently unrelated to the issue.

Neither Section 2, cited in the Commission report, nor Section 3(1), cited by appellants, purports to regulate the manner by which carriers by motor vehicle or by water are authorized to perform their services to the public. Section 3(1) concerns discrimination in service, but its remoteness from the issue here is evident from the fact that, as discussed above, Rules 2 and 3 could be fully complied with by cancelling the present TOFC tariffs, or not publishing new tariffs for TOFC service, thereby excluding private shippers and forwarders from TOFC, while maintaining TOFC arrangements with the motor carriers under Section 216(c).

ATA and NATA assert that "The Commission, however, did not rest its promulgation of the open-tariff rules on specific affirmative provisions of any one section of the Act" (ATA-NATA Br. 26). When the Act is viewed as a whole, however, it is plain that Congress has provided for each of the respective transportation agencies to operate in its own mode of operation, with coordinations and interchange arrangements between motor carriers and rail-

roads to be made in the manner provided for in Section 216(c), covering through routes and joint rates, rather than by transforming a motor carrier into a shipper by rail.

The antidiscrimination decision now alleged by appellants to be "most nearly in point here"* is *I.C.C.* v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911). This Court, upholding the Commission, held unlawful under Section 2 certain tariffs by which on carload shipments some railroads charged forwarders and shipper associations the higher less-than-carload rates rather than the carload rates charged individual shippers. This case affords no support for appellants' claim that motor carriers, as regulated under Part II, are entitled to ship rather than carry their customers' freight. Before regulation, a person operating a motor carrier service could engage in innumerable operations and practices that are not permitted to him under regulation. For example, he could operate over either private or public highways and could change his highway routes at will. Under regulation, he receives the benefits of protection against unlicensed competitors but must conform to Part II, including the stricture against using any route for the performance of his service other than the public highway route specified in his certificate or permit, and the Commission can allow no more than "occasional" deviation therefrom. Deviation to a railroad route is not permitted. The motor carrier cannot be permitted (without change in his certificate) even to deviate by operating his trucks on a highway alongside a railroad, despite the fact that such a route might be the most direct and economical one for him. *A fortiori* he cannot take his carrier freight off the highways and ship it by rail. For motor-rail service, Section 216(c) provides the statutory way.

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*Govt. Br. 39; see also ATA-NATA Br. 26, 28.

The appellants' attempt to assimiliate the forwarders of *Delaware, L. & W. R.R.* to motor or water carriers aptly illustrates the fashion in which Rules 2 and 3 would unlawfully put those carriers in the freight-forwarding business. Thus the Government contends:

> "If a railroad must treat a freight forwarder tendering goods for shipment no differently from an ordinary shipper—the teaching of that case—so it must offer a motor carrier the same trailer-on-flatcar service it offers conventional shippers (including freight forwarders)." (Govt. Br. 33)

No statute or case, however, supports or suggests such an assimilation of motor and water carriers with freight forwarders. To the contrary, the right of forwarders to ship over line-haul common carriers, recognized in the *Delaware, L. & W. R.R.* case, was carefully established by Congress in specifically authorizing freight forwarders to utilize "for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act" (Section 402(a)(5)(C); 49 U.S.C. 1002(a)(5)(C)). No such right is conferred on motor, water or rail carriers and, indeed, the Act specifically prohibits them from obtaining freight forwarding permits (*ante*, pp. 13-20). Part IV of the Act reflects and protects the unique status of forwarders by, on the one hand, not permitting them to perform line-haul transportation between terminals or to enter into through routes and joint rates but by, on the other hand, specifically granting them the right to utilize the services of the authorized line-haul carriers.

Moreover, if the antidiscrimination provisions in Sections 2 and 3(1) were to be given the effect as to TOFC service that the Government urges, the ramifications would produce chaos throughout the transportation industry on all kinds

of service. Rules 2 and 3 apply only to the railroads' TOFC service and appellants' briefs are directed to that service. If the theory, however, is that a carrier has a right to act as a shipper and to ship via another carrier, the principle would similarly apply to all kinds of freight in all kinds of rail cars.* And railroads, too, would be permitted to act as shippers via motor carriers and water carriers in lieu of performing their authorized rail service, since similar anti-discrimination sections are in Parts II and III (49 U.S.C. 316(d), 905(c)). Appellants' theory cannot be passed off as a one-way intermodal principle permitting one type of carrier to ship its customers' goods over another type of carrier but not similarly permitting the latter to ship over the former. Appropriate regulation of the various transportation agencies would be made most difficult. Indeed, in explaining the policy of not permitting common carriers by rail, motor or water to engage in the freight-forwarding business, shipping their traffic over other carriers, the House Committee Report emphasized that the policy adopted and followed "will result in more satisfactory administration of the provisions of the act as a whole than would be the case if direct freight-forwarding operations by common carriers subject to part I, II, or III were permitted." (H. of R. Report No. 1172, 77th Cong., 1st Sess., Aug. 13, 1941, p. 15.)

Appellants completely ignore these considerations. Ironically, however, the Government refers to and relies upon a physical carrier's "duty of carriage" (Govt. Br. 58, n. 35). It would apply that duty only to railroads, arguing

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* As the District Court noted, if the antidiscrimination sections were construed to authorize Rules 2 and 3, then "The Rules announced, limited as they are to TOFC shipment, would fall far short of the need for guidance were the novel interpretation of the Act to be sustained; the greater need would be for rules to govern the problem of handling freight in other forms" (R. 28).

that the railroad could not ship the freight over the same motor carrier that had initially tendered the freight to the railroad in lieu of performing the motor carrier's own "duty of carriage." No such distinction has been made by Congress in the Act; neither motor carriers nor carriers by rail or water are permitted to ship their traffic over another carrier in lieu of performing their own authorized service for that traffic.

III. THE LEGISLATIVE HISTORY OF THE RECENT BILLS TO AMEND THE ACT CONFIRMS THE UNLAWFULNESS OF RULES 2 AND 3

The Government's complaint against the refusal of certain railroads to enter into through route arrangements with all motor carriers, and to do so on non-discriminatory terms, is a complaint against a policy that Congress has established and firmly maintained. For several years the Commission has sought from Congress the power to increase the coordination of rail and motor carrier service by the establishment of compulsory through routes. Congress has regularly and consistently declined to grant that power to the Commission. Under the authority sought, the Commission would have been empowered, among other things, to order railroads to transport trailers or containers of a motor carrier containing the shippers' goods.

Congress has refused to approve such a change in the Act, even though the Commission assured Congress that it would exercise the sought compulsory power only "in proper cases," after investigation and hearing, and that it would "protect the carriers from unfair or unreasonable demands to provide through service." (75th Annual Report of the I.C.C., 1961, p. 186).* The farthest that Congress

* Similar recommendations were made by the Commission in 1962 (76th Ann. Rep., p. 201) and in 1963 (77th Ann. Rep., p. 19).

has been willing to go in the coordination of railroad and motor service has been to provide for voluntary through routes and joint rates, with no compulsion on any carrier.

In 1962 and 1963 Congress considered another proposal for increased coordination. The proposal would have made an exception, for piggyback shipments, from the general rule regarding the inability of a carrier to ship its customers' goods via another carrier. Under that proposal a motor carrier would be given the right to ship by rail piggyback, and the railroad would be compelled to handle the motor carrier shipments. The President's Transportation Message of 1962 said that certain "changes in the Interstate Commerce Act . . . are needed . . ." and stated:

> "I recommend that legislation be enacted to:
>
> "(4) assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to noncarrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast-growing piggyback and related techniques." (H. of R. Doc. No. 384, 87th Cong., 2d Sess., p. 5)

Identical bills to implement this recommended change in the scheme of the Act were introduced in both houses of Congress in 1962 before the 87th Congress and again in 1963 before the 88th Congress. Hearings were held before the committees of both houses. The hearings developed that the bills were deficient to accomplish the intended purpose. They also developed that the intended result would seriously disrupt the transportation industry.

The bills would have amended Section 2 of the Act (relating to railroads), Section 216(d) (motor carriers), and Section 305(c) (water carriers) by adding to each section the following new provision:

"Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated."*

The attention of Congress was called by several witnesses to the fact that the Act, as it stands, has been interpreted for a generation to mean that carriers by motor vehicle cannot ship the goods of their customers by rail. For example, the statement of the Comptroller General of the United States, addressed to the Honorable Oren Harris, of the House Committee on Interstate and Foreign Commerce, included the following:

"If enacted, this section apparently would have a bearing on decisions of the Interstate Commerce Commission concerning so-called piggyback services. See, for example, *Substituted Freight Service,* 232 I.C.C. 683 (1939), in which the Commission stated that *one could not act as a common carrier by motor vehicle and as a shipper by rail as to the same shipment;* and *Movement of Highway Trailers by Rail,* 293 I.C.C. 93 (1954), in which the Commission found that *motor contract carriers could not lawfully make use of any piggyback services."* (Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H.R. 4700 and H.R. 4701, April 30, 1963, pp. 20-21)

The witness who appeared on behalf of the freight forwarders in opposition to the proposed change in the Interstate Commerce Act stated, in part, as follows:

"I will show that the method proposed by the bill for carrying out the recommendation is legally inadequate,

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* In Secs. 216(d) and 305(c) this language would have been preceded by the words "Provided further, however, that . . ." (S. 3242, 87th Cong., 2d Sess.)

and that even if the recommendation itself were sound, which it is not, many additional changes in law would be necessary to accomplish the stated purpose of equality.

"The bill proposes to authorize a carrier of one kind to ship its empty or loaded trailers by a carrier of another kind on the basis of rates published for use by shippers. It purports to do this by the expedient of amending the antidiscrimination sections of parts I, II, and III of the act.

"This ignores the fact that the basic scheme of the law, and numerous specific provisions thereof, make it unlawful for a motor, rail, or water carrier to use the services of other carriers as shippers.

"In Substituted Freight Service, 232 ICC 683, decided in 1939, the Commission said that for a motor carrier to act as a common carrier by motor vehicle and as a shipper by rail as to the same service is repugnant to the act.

"In a comprehensive proceeding involving piggybacking decided in 1954, Movement of Highway Trailers by Rail, 293 ICC 93, the Commission reached the same conclusion.

"It has consistently adhered to this finding for 24 years. The repugnancy to the act cannot be cured by a simple amendment to the antidiscrimination sections.

"In pointing out other changes in the law that would necessarily have to be considered as an integral part of the proposal made by the bill, I wish to make clear that we do not recommend such changes.

"We are strongly opposed to this provision of the bill, but we think the committee ought to know what the recommendation entails. (*Id.* at 516-517)

"• • •

"Sections 203(a)(13) and (14), which define the terms 'motor vehicle' and 'common carrier by motor

vehicle,' respectively, clearly confine motor common carriers to the use of the public highways of the United States.

"These definitions contain no authority for a motor carrier to operate by railroad or by water, or to use rail or water routes.

"Simply to change the antidiscrimination provisions of the act, as the bill proposes to do, will not remove these statutory prohibitions.

"Unless the definitions are amended, section 3 of H.R. 4701 could have no effect whatsoever.

"To change these basic definitions poses a crucial question of fundamental transportation policy. It involves changing the course and concept of highway transportation with consequent serious effects on the transportation system as a whole." (*Id.* at 518)

After suggesting the form of change in the statutory definitions which would be necessary if Congress were to decide to approve the proposal, the witness said:

"It would be necessary also to amend section 203(a)(14). That section defines 'common carrier by motor vehicle' as a person who engages in transportation by motor vehicle 'over regular or irregular routes.' To this it would be necessary to add the phrase 'whether upon a highway or by rail or water.'

"Comparable amendments also would need to be made in parts I and III of the act, so that no carrier, in the future, would be confined to any particular type of transportation or kind of route, but could employ the services and routes of other modes in the provision of its service.

"If Congress is to consider authorizing motor carriers to ship their vehicles or containers via rail or water, in lieu of hauling them over the highways, it should concurrently consider changing the basic law which now confines them to the highways. The law gov-

erning the granting of motor carrier certificates, permits, and alternate routes is involved in section 3 of the bill.

"Sections 203(c) and 206(a)(1) of the act make it unlawful to engage in for-hire or common carrier transportation on any 'public highway' without a certificate.

"Before section 3 of the bill could have any effect these sections would have to be amended to make them apply not only to transportation on any 'public highway' but to transportation 'over any line of railroad or any water route.'

"Section 208(a) of the act specifies the terms and conditions which the Commission may or must include in motor carrier certificates.

"It provides that the certificates must specify either the precise highways over which, the fixed termini between which, or the territory within which, the holder may operate. Clearly this section would not permit the granting of a route via rail or water.

"The force and effect of this section would be destroyed if, as proposed by the bill, motor carriers could depart at will from the operations specified in their certificates." (*Id.* at 518-519)

He then outlined possible statutory changes which, if the proposal were approved, would be needed to establish appropriate "standards for granting rail or water routes" to motor carriers, and added:

"If such safeguards as these are not written into the law the entire pattern of motor carrier operations, carefully established over a period of more than 30 years, would be destroyed overnight.

"The routes specified in certificates would become meaningless—indeed the certificates themselves would become of little value.

> "And every motor carrier in the United States would be given a wide-open invitation to enter the freight forwarding business without a permit." (*Id.* at 519)

He also commented on that portion of the recommendation to Congress which referred to an intention to put other carriers in a "position of equality with freight forwarders." He noted that:

> "Equality is a two-way street, but the bill does not propose to put freight forwarders in a position of equality with other carriers.
>
> "From the very beginning of regulation the motor carriers have had the right to make joint rates with railroads, express companies, and water carriers—a right which is denied to freight forwarders.
>
> "That is the characteristic which distinguishes the two types of carriage. Motor carriers have the right to negotiate joint rates on a 'divisional' basis, whereas forwarders are limited to the payment of whatever rates or charges the railroads publish for the use of the general public.
>
> "Now it is elementary that if motor carriers are given access to the forwarder method but forwarders are still denied the motor carrier method, equality is not achieved but inequality is compounded." (*Id.* at 520-521)

At the end of his statement about the proposal, in which he had described the several amendments to various parts of the Act that would be necessary if Congress were to approve the idea of changing the Act to allow motor and water carriers to ship by rail, the witness said:

> "In concluding my remarks about this section of the bill, I repeat that the freight forwarding industry does not sponsor the amendments I have outlined.

> "We point out simply that they are integral parts of the question raised by section 3 of the bill, and consideration of that section necessarily involves consideration of the issues raised by the further amendments I have described. I have tried to place the full picture before you." (*Id.* at 521)

After hearing this presentation by the representative of the freight forwarders, and the statements of various persons on the subject, the Committee did not approve the proposal to give the carriers "the right to ship vehicles or containers on the carriers of other branches of the transportation industry." The House Report No. 1144, 88th Cong., 2d Sess., stated that: "Following the hearings, the committee last fall gave extensive consideration to the type of legislation it should recommend to be enacted. . . . The committee did not include in its consideration the proposed . . . extension to all shippers and carriers of the right to ship vehicles and containers by any mode. . . ." (*Id.* at 7-8).

We do not know of even a single witness who told Congress that the proposed legislative change was unnecessary on the ground that the Act already gave carriers that right.

The Commission informed the Committee that "we lack sufficient information upon which to take an informed position on [the proposed amendment], *the ramifications of which are far-reaching and could drastically affect basic and long-estabished relationships between carriers*" (Hearings before the Committee on Interstate and Foreign Commerce, H. of R., 88th Cong., 1st Sess., on H.R. 4700 and H.R. 4701, p. 32). Referring to this proceeding which was then pending, the Commission said that "we intend to review thoroughly and to evaluate and resolve (or, where necessary, formulate appropriate legislative recommendations concerning) the issues presented by the rapid acceleration in the growth of coordinated motor-rail activities under the

various piggyback plans" *(Ibid.)*. The Commission then asked Congress "to encourage greater coordination of services by enacting legislation" to give the Commission power to order through motor-rail routes and joint rates into effect (*Ibid.*). Congress, however, again declined to do so.

The representative of ATA criticized the proposed piggyback amendment as being "seriously defective" and urged that motor carriers should be treated "as carriers" rather than being forced "into a behavior pattern which is basically shipper oriented" (*Id.* at 212). This is the very pattern that Rules 2 and 3 would now create, without benefit of legislation. He also stated that "the ICC proceeding is one that should be permitted to be concluded before any final action would be taken on this particular recommendation" (*Id.* at 213). As mentioned above, there was no contention that the Act, unamended, gave all carriers the right to ship over all other carriers, or that the Act already treated motor carriers as shippers and permitted them to ship on the rail TOFC tariff service.

The far-reaching ramifications of Rules 2 and 3, and their drastic effect upon the basic and long-established relationships among the carriers—relationships that have been created by careful and deliberate Congressional action over many years—afford strong reasons for upholding the unanimous decision of the lower court in this case. The Act as created by Congress does not provide for or contemplate that motor, rail or water carriers can act as shippers and forward their traffic rather than performing their duty of carriage or joining with other carriers to do so under the permitted through routes and joint rates. Congress itself has declined the Commission's repeated requests for power to order motor-rail coordinations into effect by means of compulsory through routes and joint rates. Congress established and has never changed its policy against permitting

common carriers by rail, motor or water to engage in freight-forwarding operations. If the policies of Congress are to be changed, it is a matter for Congress to consider and decide, not one for the Commission. By the terms and purposes of the Act as it now stands, and as it has stood unchanged in any pertinent respect for more than a generation, Rules 2 and 3 are unlawful.

CONCLUSION

The National Transportation Policy states: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, *so administered as to recognize and preserve the inherent advantages of each.* . . . All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." (49 U.S.C., preceding Sec. 1)

By Rules 2 and 3, permitting carriers by motor vehicle and carriers by water to engage in a forwarding business of shipping their freight by railroad TOFC service instead of transporting it by motor vehicle or by water, the Commission would destroy the plan of Congress for separation of the several modes of transportation according to the type of activites that each mode is authorized to conduct. The essential, distinctive inherent advantage of freight forwarders—the right to utilize the tariffs of line-haul carriers—would be added to the advantages of a competing mode enabling it to become a multi-service transportation agency with no correlative mitigation of the forwarders' statutory disadvantages. The impact of the rules on the freight forwarders "may very well destroy the freight forwarding industry" (Vice Chairman Webb, dissenting, 332 I.C.C. at

394). The rules conflict both with the particular sections of the Act which we have mentioned and also with the policy directive to the Commission to "recognize and preserve the inherent advantages of each" mode of transportation. For this reason, and for the other reasons set forth above, the unanimous judgment of the court below should be affirmed.

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April, 1967

APPENDIX

Section 410(c) of the Interstate Commerce Act, 49 U.S.C. 1010(c), provides:

> "The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed, and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. No such permit shall be issued to any common carrier subject to part I, II, or III of this Act; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to part I, II, or III of this Act, shall be denied because of the relationship between such corporation and such common carrier."

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APPELLEE'S BRIEF

SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
APR 11 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 57

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*;

No. 59

NATIONAL AUTOMOBILE TRANSPORTERS ASSOCIATION OF DETROIT, MICHIGAN, *Appellant*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*; and

---

No. 60

UNITED STATES, ET AL., *Appellants*,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES SOUTHERN RAILWAY COMPANY, ET AL.

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BRIEF FOR APPELLEES SOUTHERN RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY; THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY; GEORGIA, SOUTHERN AND FLORIDA RAILWAY COMPANY; AND CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

Questions Presented

In addition to the question framed in the brief for the United States and the Interstate Commerce Commission,

the following question is raised by the character of that brief:

Whether the action of the Interstate Commerce Commission here in issue should be sustained on the basis of statutory authority not relied upon by the Commission and alleged facts neither relied upon by the Commission nor supported by the record before it.

Statutes and Rules Involved

The National Transportation Policy, 49 U.S.C. preceding § 1, and sections 1(4), 2, 3(1), 3(4), 15(3), 216(c), 216(d), 217(a), 306(a), 402(a)(5), 410(a)(1), and 410(c) of the Interstate Commerce Act, 49 U.S.C. 1(4), 2, 3(1), 3(4), 15(3), 316(c), 316(d), 317(a), 906(a), 1002(a)(5), 1010(a)(1), and 1010(c), and Commission Rules 500.2-500.3, 49 C.F.R. 500.2-500.3 (Supp. 1966), are printed in the Appendix, *infra*.

Statement

The Government's statement of the case includes—indeed, in the main concentrates upon—a number of assertions of fact that have no basis whatever in the report of the Interstate Commerce Commission and that, moreover, are not supported by the record.[1] Accordingly, we are obliged to discuss the facts in some detail.

The appeals in this case are from that aspect of a judgment of a three-judge United States District Court holding invalid certain rules promulgated by the Interstate Commerce Commission to regulate trailer-on-flatcar ("TOFC") service. The rules were issued in a decision entitled *Ex Parte 230, Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service)*, 322 I.C.C. 301, which we refer to hereinafter as "*Ex Parte 230*."[2] In brief, those rules, which

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[1] For convenience we use "the Government" to refer collectively to the attorneys for both the United States and the Commission.

[2] In No. 58, *The New York Central Railroad Company* v. *United States*, the New York Central, which is also an appellee in the case at bar, has

are often referred to as "open tariff" rules, and which are set forth in the Appendix hereto at pages 8-9, require the railroads to offer to motor carriers the same TOFC service that is offered to shippers.[3] Before discussing the rules and the procedural history of this litigation in detail, we describe the nature of existing TOFC services so that the impact of the rules may be fully appreciated.

1. *The nature and development of TOFC service.* TOFC is an important transportation development based on a simple technique. By the use of TOFC, the long-haul cost advantage of rail transportation is made available to shippers and consignees who are not located on railroad sidings. Without TOFC, when such a shipper wishes to transport freight by rail, the freight must be loaded onto trucks, hauled to the railroad, unloaded from the trucks, and reloaded onto rail freight cars. At the other end of the rail movement, if the consignee also is not located on a railroad siding, the freight must be unloaded from the rail freight cars, loaded onto trucks, hauled to the point of destination, and unloaded again. With TOFC, the costly intermediate loadings and unloadings are eliminated simply by placing the truck trailer itself, or a container designed for transportation by both truck and rail, on a rail flatcar.

TOFC is a "bimodal" form of transportation in a physical sense, like any other type of rail-motor movement, in that the rail transportation must be supplemented at one or both ends by motor transportation. However, it is not a "hybrid" service in the sense that it combines in a single mode of transportation the features of both rail and motor service. Trucks and railroads are used in their

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appealed from that aspect of the judgment of the three-judge court that *upheld* a rule issued by the Commission in *Ex Parte 230*. That rule is not related to the rules here in issue. No other party to the District Court litigation has appealed from the aspect of the judgment involved in No. 58.

[3] Technically, water carriers would also be beneficiaries of the rules, but this litigation has from its start focused exclusively upon motor carriers.

distinct, familiar roles—trucks on the highways, railroad cars on the rails. Thus, in *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 97-101 (1954), where the motor carriers attempted to block the development of TOFC, the Commission rejected the motor carriers' fanciful argument that railroads become motor carriers when they transport trailers or containers on flatcars.[4] And the commission reaffirmed that ruling in the case at bar (Rep. 343).[5]

While TOFC service has been available for a long time, the Commission pointed out in *Ex Parte 230* that "[t]he experience . . . of most railroads . . . was very limited until 1954, the year in which [the] Commission gave approval to a number of practices that were then slowly developing. See *Movement of Highway Trailers by Rail*, 293 I.C.C. 93, the so-called *New Haven case*" (Rep. 305-307). "Almost immediately" after the *New Haven* decision, "a number of railroads inaugurated or expanded their . . . TOFC operations," and from 1959 to 1964 the growth of TOFC was "explosive" (Rep. 305, 307). In order to promote TOFC service, "substantial investments have been made by the railroads and others in TOFC equipment." Thus, for example, a single carrier, the New York Central, by the time of the *Ex Parte 230* hearings, had invested almost 30 million dollars (Rep. 309).

The growth of motor carriage over the past few decades has, of course, resulted in an enormous diversion of traffic

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[4] "We cannot say that a freight-laden trailer secured to a flatcar, which in turn is coupled in a train being drawn by a locomotive over steel rails laid on the railroad's right-of-way, is transportation over such a 'highway.' Nor can we agree that the transporting vehicle is a motor vehicle; rather, it is a flatcar which is an integral component of a train 'operated exclusively on . . . rails' . . . ." *Id.*, at 100-101.

[5] The Commission's *Ex Parte 230* report has not been reprinted in the record, but has been included in its original slip opinion form in the record in Volume 2 at page 795. Accordingly, we cite the report herein as "Rep." and use the original pagination.

from the railroads to both motor common carriers and, particularly recently, to private carriage by companies that have established their own fleets of trucks. The precise degree to which TOFC service has enabled the railroads to recapture some of this traffic is not clear. As the Commission stated, "At the present time the available statistical data . . . is not sufficiently refined or reliable to demonstrate authoritatively the precise extent to which railroad successes with piggybacking have meant actual diversions of traffic from competitive modes of transport" (Rep. 308). However, TOFC service has certainly had some impact, particularly in deterring the growth of private carriage. Thus, the Commission stated, "There can be no doubt of the benefit which TOFC service has already rendered the railroads in allowing them to recapture traffic lost to competing modes of transportation, and especially to private motor carriage" (Rep. 322).[6] In short, on the basis of the record the Commission concluded that, while the degree of TOFC's success was not measurable, TOFC service had certainly returned to the railroads some part of the traffic it had lost to common and private motor carriage, and also that TOFC had had more impact in reducing the amount of private carriage than in recapturing traffic from motor common carriers.

These statements by the Commission bear only upon the impact of the rail TOFC movement upon comparable long

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[6] The Commission gave three examples it thought were "typical" (Rep. 307-308). One of them involved Monsanto Chemical Company, which had initially shipped by rail, then shifted to motor carriage, and was "on the verge of going heavily into private motor carrier operations" when the advent of TOFC encouraged it to continue to use common carriers. There are a great many similar situations disclosed by the record. See R. 198-199, 210-211, 220, 258-260, 261, 265, 267, 269, 273, 274, 275, 276, 278, 279, 280, 281, 286, 288, 293, 294, 297, 299, 301, 304, 383, 389, 390, 392, 394, 395, 396, 398, 447, 450, 453, 466, 470, 482, 489, 491, 492, 493, 501, 506, 514, 516-519.

haul motor carrier movement. They have nothing to do with the question of motor carrier participation in the trucking portion of a TOFC movement where the shipper or consignee is not located at a rail siding. The Government's attack on present TOFC practices, however, relates exclusively to this aspect of TOFC service. That is, the Government does not suggest that there is anything wrong with the railroads' securing long-haul railroad traffic—as to which the Government concedes the railroads are generally the low-cost transporter (Br. p. 3)—at the expense of long-haul motor carrier traffic, common carrier or private. What the Government does suggest is that the motor carriers are being unfairly dealt with respecting the transportation of freight from the shipper's dock to the rail siding in connection with TOFC service. In order to evaluate the Government's contentions, it is necessary as a preliminary matter to describe with some specificity the various forms of TOFC service.

2. *The five TOFC "plans."* TOFC service has been employed under what are commonly known as five "plans" that are described in detail in the Commission's Report (pp. 309-312). For present purposes, the most important feature of the various plans is that certain of them have been made available by the railroads to shippers without joint participation by motor carriers; while others have been designed for use by shippers only through joint service offered by railroads and motor carriers. In more detail, the principal types of TOFC service are as follows:

The three all-rail plans available to shippers—generally referred to as Plans II, III, and IV—differ with respect to the extent of service the railroads offer to perform. Thus, under Plan II the railroad provides a complete door-to-door service, including pickup and delivery. Under Plan III

the railroad performs only a ramp-to-ramp service, with pickup and delivery being the obligation of the shipper. Plan IV is also a ramp-to-ramp service, but it differs from Plan III in that the shipper furnishes a flatcar in addition to the trailer, the railroad supplying only the power and rails.

The two plans offered to shippers by railroads in cooperation with motor carriers are called Plans I and V. The critical common characteristic of these Plans is that they are entirely voluntary arrangements between the carriers in which all aspects of the service, including the compensation to be received by each carrier, are decided upon by mutual agreement. It may be useful, however, to point out the principal respects in which these Plans differ.

Plan I is fundamentally an arrangement under which the motor carrier substitutes rail TOFC service for its authorized highway service. Thus, the traffic is solicited by the motor carrier; it moves under motor carrier rates and the motor carrier's bill of lading; the service is available only between points that the motor carrier is authorized to serve over the highway; and the shipper has the right to forbid use of the TOFC service so as to require transportation by highway, but not the right to demand TOFC service. The applicable rates are published in regular motor carrier tariffs that contain a provision referring to so-called "substituted service directories," which set forth the service covered, the points of interchange, and the names of the participating carriers.

In contrast, Plan V is a typical joint rate-through route arrangement under which service may be offered to points that the motor carrier is not authorized to serve, as well as to points it is authorized to serve. Thus, the traffic may be solicited by either the motor carrier or the railroad; the traffic moves under motor-rail, rail-motor, or motor-rail-

motor joint rates and over through routes published in joint tariffs; and the traffic must move over the designated motor-rail TOFC route. That is, the motor carrier does not have the option to use highway service for the TOFC segment.

3. *Motor carrier participation in TOFC service.* By definition, every TOFC movement requires the transportation of a trailer or container by truck at one or both ends of the rail movement. The Government's brief is designed to establish that, as to this trucking portion of a TOFC movement, the motor carriers have been unfairly treated by the railroads. This effort is insupportable. In this portion of our statement of facts, we set forth the relevant facts that can be deduced from the character of the various TOFC plans or that appear in the Commission's or the Examiners' reports. We defer to later discussion a particularized examination of the Government's version of the facts.

In the two plans offered to shippers by railroads in conjunction with motor carriers—Plans I and V—the motor carriage portion of the movement, of course, is provided by the motor carrier that has entered into the plan in question with the railroad. Thus, the Government's complaint relates to the plans (II, III, and IV) offered directly by railroads to the shipper.

As to these three plans, it is important to note that only under Plan II (door-to-door) does the railroad undertake to perform the trucking service incident to the TOFC movement, and that the railroad can do this only where specifically authorized to perform motor carriage under the Interstate Commerce Act. In this connection, section 202(c)(2), 49 U.S.C. 302(c)(2), permits railroads to perform trucking pickup and delivery services within terminal areas—a type of service they have traditionally performed and that is

regulated as railroad service. Thus, for example, on a TOFC movement from New York to Chicago, the railroad could pick up the freight by truck in New York, ship it by rail to Chicago, and deliver there by truck. However, as the Examiners' recommended report, supported by other data of record, makes clear, even under Plan II railroads often—and probably more often than not—hire trucking concerns to perform the terminal trucking services rather than performing those services themselves or through a trucking subsidiary (R. 772, 264-265, 773, 268, 776, 233, 786, 138). For example, these appellees, The Southern Railway System, *always* employ short-haul carriers or local cartage companies (R. 773, 268).

Under the other two "all-rail" plans—Plans III and IV—it is the shipper's obligation to provide for the motor carriage to the railroad ramp. The shipper may hire a motor carrier to perform that service, or the shipper may perform the service himself. If the shipper performs the trucking himself, he may employ his own equipment or lease it from a leasing company or a railroad.

The Commission did not make any determination respecting the relative degree to which shippers perform the trucking services incident to Plans III and IV TOFC service or hire motor carriers to perform that service. The Commission did state that "[t]rip leasing of trailers from the railroads or their subsidiary leasing companies has become commonplace with many shippers and freight forwarders" (p. 312). Even in such a case, however, the shipper may hire a motor carrier to operate the leased equipment. Still, it is certain that in some undetermined number of instances the shipper does not hire a motor carrier.

There is no basis, however, for any suggestion that the railroads' leasing practices have had an unfair impact upon either shippers or motor carriers. Much of the Report

was devoted to the matter of leasing, for the motor carriers urged that the practice be proscribed while shippers vigorously opposed that suggestion.[7] The Commission concluded that there was no warrant for curtailing leasing in any fashion, and that any potential problems could be handled simply through tariff-filing requirements to insure that there would be no discrimination between shippers. As the Commission put it:

> "While we recognize that there are opportunities for discrimination in present rate publication and equipment leasing practices, we cannot agree with the A.T.A. that the only available cures are a straitjacket for TOFC tariffs and major surgery to excise trailer leasing. . . .
>
> "... The record before us is almost completely devoid of evidence that these opportunities for discrimination have been misused. . . . We agree with the examiners that tariff rules providing for the publication of charges for leasing trailers and for other special TOFC services will eliminate many of the present opportunities for abuse. Should this approach prove ineffective, additional steps can be taken at some future time. At present, we conclude that they are not needed, and that regulations substantially similar to those recommended will suffice" (Rep. 370-371).

This is all that can fairly be said about motor carrier participation in the trucking service incident to TOFC service on the basis of the Commission's report and the examiners' report. It obviously is far removed from what the Government says. As we have indicated, we will deal in detail with this discrepancy later.

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[7] See, *e.g.*, R. 270, 271, 272, 273, 274, 275, 283, 284, 287-288, 289, 290, 291, 293, 294, 296-297, 299, 301, 722, 723, 725, 433, 435, 439, 441, 450, 452, 455, 460, 464, 483, 487, 489, 496, 503, 509, 513.

4. *Commission regulation of TOFC prior to Ex Parte 230.* The pattern of TOFC service described above, under which certain plans are made available by railroads to shippers while others are made available to shippers jointly by railroads and motor carriers, developed under the explicit direction of the Commission. In 1954, the Commission established guidelines for the development of TOFC service in order to "enable carriers and shippers interested in undertaking or using this type of service to proceed with a degree of assurance as to the fundamental principles pertaining thereto." *Movement of Highway Trailers by Rail* (the *New Haven* case), 293 I.C.C. 93, 111. Two major aspects of the Commission's rulings in *New Haven* were of critical importance: First, the Commission, reaffirming a principle long established, held that the anti-discrimination provisions of the Interstate Commerce Act did not require railroads to deal with shippers and competing carriers on the same basis. *Id.*, at 105. Second, the Commission, again reaffirming prior decisions, ruled that railroads could not make available to motor carriers their "open tariff" TOFC service offered to shippers even if the railroads wanted to. As the Commission put it, it would be "repugnant to the Act" for motor carriers to ship under the "open tariffs" even with railroad consent "in the absence of a through-route arrangement between the connecting carriers." *Id.*, at 105. In sum, motor carrier participation in TOFC service had to be by way of establishment of through route-joint rate plans; but this did not foreclose the railroads from offering TOFC service directly to shippers where either the railroad was authorized to perform the incidental trucking service or where the shipper was willing to arrange for the performance of that service.

The *New Haven* decision accomplished its purpose: It provided "assurance as to the fundamental principles" governing TOFC service, and—as the Commission in *Ex Parte 230* recognized (*supra* p. 4)—the railroads consequently invested heavily in the establishment of that service. It is the reversal of *New Haven* and its antecedents by *Ex Parte 230* that has given rise to this litigation.

5. *The Ex Parte 230 proceeding.* To the extent the Government's brief implies that the focus of the *Ex Parte 230* proceeding was upon the desirability of "open tariff" rules —and the implication seems clear enough—the Government is in error. As the Commission's report shows on its face—it consists of 104 pages only 10 of which are devoted to "open tariffs"—*Ex Parte 230* was a broad inquiry into virtually every aspect of TOFC service, an inquiry that resulted in a large body of rules relating to a number of different subjects. Not only was the question of "open tariff" rules one of many subjects considered by the Commission, but it was a subject that was given virtually no attention by either the Commission or any of the parties until the very end. What happened was this:

The rule-making proceeding was instituted by an order of the Commission dated June 29, 1962 (R. 55). The purpose of the proceeding was stated to be an inquiry "into the practices of, and the manner and methods of the performance and use of," TOFC service. Among the various issues that were specifically described in the order was one relating to "open tariffs"—"the extent to which motor carriers, water carriers, express companies and freight forwarders should be permitted to use Plans III and IV TOFC rail rates and service in their operations" (R. 56). However, in the written "representations" that the parties—who included all carriers and freight forwarders subject to regula-

tion (R. 57)—were invited to file, the inclusion of such an issue, which had been long settled by decisions such as *New Haven*, was opposed by some (*e.g.*, R. 102-104) and received relatively little support from others.[8] Then, at a prehearing conference held on October 9, 1962, the Commission distributed proposed Rules and Regulations based on the information secured by the representations and by responses to questionnaires sent to certain carriers (R. 129). Those proposed rules, which the Commission described as "a framework upon which can be developed the rules ultimately to be adopted" (R. 129) and as to which the parties were requested to state their positions (R. 126), did *not* contain any "open tariff" rules. Next, in an order of October 11, 1962, the Commission directed that each party file a special pleading "(1) setting forth whether it agrees in whole or in part with the proposed Rules and Regulations . . . and (2) suggesting changes and modifications of such Rules and Regulations as well as such additional rules as may be deemed appropriate" (R. 154). In these special pleadings that were then filed, the only mention of "open tariff" rules was by one carrier that wanted such rules, but restricted to households goods (R. 176). Accordingly, there was hardly any mention of this issue in the verified statements and reply verified statements filed by the parties, of which the evidentiary record consists. (No oral testimony was taken.)

In these circumstances, it was hardly surprising when the Examiners' proposed rules did not contain any "open

[8] While the Regular Common Carrier Conference supported "open-tariff" rules, as did Consolidated Freightways, Delta Motor Lines did not, and Pacific Intermountain Express thought the Commission should seek legislation (R. 69-70, 87, 113, 124). This is all there was in the 73 representations that were filed, of which some 35 came from motor carriers or their associations (R. 130-135).

tariff" provision. But it *was* surprising when the Commission, in its notice of oral argument (R. 792), resurrected this issue that had been dropped after the initial notice of hearing.[9]

Having raised, then abandoned, and then reraised the "open tariff" issue at the eleventh hour, the Commission finally in its *Ex Parte 230* report overruled *New Haven* and a host of related decisions and promulgated the "open tariff" rules. Under those rules—Rules 2 and 3 set forth in the Appendix at pp. 8-9, *infra*—railroads are required to permit motor carriers to use TOFC Plans II, III, and IV on the same basis as shippers. The shipper whose freight is being transported, however, pays the motor carrier's rate for all-highway transportation and has no right to require that TOFC be employed. He may only veto its use. Thus the option whether to use TOFC is solely that of the motor carrier. Moreover, he may use it for "all or any portion" of his authorized service (Rule 3(a)); so that under the Plan II "door-to-door" service he need perform no transportation at all; he can merely secure the order from the shipper and place it with the railroad, never touching the freight. And, finally, there can be no dispute that, under the Rules, the motor carrier may act precisely as a freight forwarder. That is, the motor carrier may collect a number of individual shipments, charging his own rate as to each; combine those shipments into a trailer-load; ship that trailer by rail under a TOFC plan; break-bulk at destination; and make his profit by virtue of the difference between the

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[9] It was also perhaps surprising that, at the oral argument, the "open tariff" rules did not command the unanimous support even of the motor carrier industry. Thus, counsel for appellant American Trucking Associations, Inc., stated: "I feel it incumbent upon me to state that the regular common carrier conference which I speak for also is of the view that the motor carrier cannot use an open tariff" (R. 794).

aggregate charges paid him by the shippers and the volume trailer TOFC charge he pays the railroad.

6. *Deficiencies in the Government's version of the relevant facts.* The foregoing discussion includes all the relevant facts that, in our view, can be relied upon by any party. The Government, however, goes far beyond these facts. The Government's version of the relevant facts is insupportable. Some of its statements reflect a fundamental misunderstanding of the character of existing TOFC service. Others have no foundation in the Commission's Report for the very good reason that they have no foundation in the record. In this portion of our brief, we catalogue some of the major factual errors in the Government's brief:

a. The central policy contention of the Government is based upon its assertion that "railroads seek to dominate the entire piggyback service, its motor as well as its rail portions," and that this is not merely a "theoretical" danger because "[r]ailroads have in fact widely, and increasingly, exploited the advantages of their position by the techniques outlined" in the Government's brief (Br. p. 19). The Commission made no finding remotely resembling this assertion by the Government. The reason it did not is clear from an examination of the "techniques" described by the Government.

(1) The first "technique" seems to be that some railroads have "declined to offer any Plan I substituted service, under which most motor carrier piggyback traffic moves" (Govt. Br. p. 11). But, as the record citations provided by the Government demonstrate, of the six major carriers named by the Government, *only one* does not offer *Plan V* service—the typical through route-joint rate rail-motor type of service.[10] It is true that Plan I appears to be more

[10] As to the Baltimore & Ohio, see R. 230-231, 233.

popular with some motor carriers than Plan V, but there is nothing whatever in the record to indicate that the National Transportation Policy or any other policy favors Plan I over Plan V. Indeed, this appellee, the Southern Railway System, is persuaded that Plan I is not lawful under the Act, primarily because it does not give the shipper the right to require that his freight be transported by motor-rail TOFC service. Accordingly, the Southern is one of the plaintiffs in the litigation that we describe in more detail later (pp. 64-65 *infra*) involving the legality of Plan I. But, as the record shows (p. 61), the Southern at the same time *does* engage in joint motor-rail TOFC arrangements of a Plan V type. Thus for the Government to assert—as the Commission did not—that the refusal of six railroads to enter into Plan I arrangements evidences a "technique" by which the railroads are "seek[ing] to dominate the entire piggyback service, its motor as well as rail portions," is wholly baseless.

(2) For the same reasons, no weight can be given the Government's statement that there is no transcontinental Plan I service—a statement which is followed by a footnote acknowledging that there now *is* such service (Br. p. 11). The portion of the record cited by the Government discloses a likely reason for any relative scarcity of transcontinental joint motor-rail TOFC service: There, one of the two—and only two—motor carriers on whose complaints the Government relies noted that a "basic way" in which TOFC can be used beneficially by motor carriers is "to minimize the problems resulting from the inevitable imbalance in traffic" between different points (R. 63). Imbalance of transcontinental traffic is well recognized as a major transportation problem. Railroads might quite reasonably be cautious lest this problem be thrust upon them alone by Plan I TOFC arrangements in which the motor

carrier decides whether to employ TOFC or all-motor transportation. Finally, once again the Commission did not so much as mention the alleged unavailability of transcontinental TOFC joint service.

(3) The next "technique" listed by the Government is that "Those railroads that did offer Plan I service generally asserted the right to pick and choose among the motor carriers. The factors considered included the interest in preventing motor-carrier piggyback rate competition with the railroads' own Plan II door-to-door service" (Br. pp. 11-12). For the last assertion, only a single railroad is referred to; and whether because of this paucity of data or because that railroad's explanation of its policy seemed perfectly reasonable to the Commission, the Commission nowhere mentioned this matter in its report.

As to the broad assertion that railroads "generally" claim the right to "pick and choose," no citation to even the record, much less to the report, is provided at all. The statement is flatly inconsistent with the Commission Bureau of Transport Economics and Statistics' summary of the information secured through the Commission's questionnaires ("Most of the railroads offering plan I to regulated motor carriers, other than to subsidiaries, generally make the plan available to any motor carrier regarded as qualified economically to handle the traffic and to do so within its rights" (R. 136-137, 607)), and with the Examiners' Recommended Report ("[s]o long as the motor carrier meets the financial responsibility and route authority requirements the railroads are generally willing to share Plan I arrangements with any such motor carrier" (R. 618)). See also R. 225, 91, 240-241, 769, 722, 778, 215, 781, 245-252. Therefore, it is difficult to know how to deal with the Government's statement. If all that the Government means to say is that railroads assert that they have the right

under the statute to enter into joint arrangements with some motor carriers and not with others, then the Government is surely correct, since the statute, under which motor-rail through route arrangements must be voluntary, 49 U.S.C. 316(c), does give railroads that right. But if the Government means to say that the railroads "pick and choose" among motor carriers as another "technique" for "dominat[ing] the entire piggyback service," then, once again, the assertion is supported neither by any Commission finding nor by the record.

(4) Another "technique" described by the Government appears to rest upon the fact that the TOFC plans offered by railroads directly to shippers (Plans II, III, and IV) have grown more rapidly than the joint motor-rail plans (Plans I and V). Because of this, the Government alleges that "piggyback, while growing rapidly, was becoming predominantly a railroad service as opposed to a joint, coordinated service of the regulated motor carriers and the railroads" (Br. p. 12). As we have pointed out and as the Government surely must concede, the railroads do *not* undertake to perform the motor carrier service in connection with two of the three plans offered directly to shippers (Plans III and IV). In no sense could the motor carrier portion of the movement under those plans be called "a railroad service." To be sure, the motor common carriers must compete with private carriage under those plans; but that is always true and the Commission found nothing amiss with it. Thus, the Government can hardly demonstrate railroad "domination" of the motor carrier phase of piggyback by showing that plans under which the railroads do *not* undertake to perform motor carrier service are growing rapidly.

It may be noted, in this connection, that the Government's failure to take into account that only in one of the

TOFC plans—Plan II—does the railroad provide door-to-door service is reflected also in the Government's interpretation of data from secondary sources (Br. 12, n. 9). Thus, the Government's assertion that "motor carriers participated in only 28 percent" of piggyback shipments rests upon the plainly false premise that motor carriers "participate" in the movements only under joint service plans and not under Plans III and IV.

In short, the fact that the Commission did not find that the growth of the TOFC plans offered directly to shippers evidences the railroads' "domination" of the trucking service incidental to TOFC movement is readily understandable: such a finding would have been untrue.

(5) Another "technique" referred to by the Government is the leasing of trailers by railroads to shippers for use in the plans (III and IV) where the shipper must provide for the motor carriage (Br. 19). The railroads are certainly free to do this and have done it, as the Commission indicated. But, as we have already pointed out, the Commission also concluded that there was no reason whatever to eliminate this option for the shipper (see *supra*, pp. 9-10). And nowhere in the Commission's report can be found any finding that this is a method through which the railroads are "seek[ing] to dominate the entire piggyback service."

The reason is clear enough. The shippers—including the Departments of Defense and Agriculture—strongly favor the continuation of leasing, presumably because the motor carriers have not always been able to afford satisfactory service.[11] Indeed, one may speculate about how fast TOFC service would have grown if the railroads had been dependent on motor carriers to provide the necessary service.

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[11] See citations provided in note 7, *supra*.

(6) Next, the Government observes that if the shipper is located in a terminal area the railroad can provide a door-to-door TOFC service directly, and if he is located outside a terminal area the railroad can do the same thing indirectly "through a trucking subsidiary or a contract trucker" (Br. 19). Here the Government is simply unhappy with the statutory provisions that permit a railroad to provide trucking terminal area services, 49 U.S.C. 302(c)(1), and under limited circumstances to own a trucking subsidiary that performs services "auxiliary to or supplemental of" train service. See *American Trucking Assns.* v. *United States*, 364 U.S. 1. Moreover while it is clear enough that Plan II terminal trucking is performed by the railroads to a substantial extent, the Commission's report does not establish anything at all about the extent to which railroad subsidiaries perform motor carriage in connection with TOFC. Presumably the Commission was of the view that any abuses of "auxiliary and supplemental" motor carrier service could be dealt with directly—as surely they can—and that the performance by railroads of motor carrier terminal services under Plan II in full conformity with the statute could hardly be inconsistent with the National Transportation Policy.

b. While the foregoing discussion covers all of the specific practices that the Government appears to regard as "techniques" for railroad "domination" of motor carrier service, the Government's brief contains a number of factual generalizations that it evidently believes are supported by the more specific factual assertions discussed above. We note below some of the more startling conclusions drawn by the Government.

The Government states that "the railroads may now refuse, at their option, to offer any piggyback service to motor carriers"; that they "are also free to charge them

rates that exceed open tariffs''; and, most importantly, that the ''railroads have frequently exercised these options, and candidly admit that a consideration in doing so is the desire to eliminate motor-carrier rate competition'' (Br. 43). As we have already demonstrated (*supra* p. 15), quite apart from the fact that nothing in the Commission's report supports this charge, the Government's list of ''largest and most strategically situated rail carriers'' (Br. p. 11) included only *one* that did not offer either Plan I or Plan V rail-motor joint service. How it can possibly be said that this establishes that the railroads ''frequently'' refuse ''to offer any piggyback service to motor carriers'' is difficult to understand.

As to the charge respecting predatory pricing practices, the Government's cross reference to pages 10-12 of its brief indicates that it has in mind the single carrier that said it did not enter into Plan I arrangements with motor carriers whose own rates between the points in question were lower than the railroads' Plan II door-to-door rates, since the result would be diversion of traffic from Plan II to Plan I (R. 79-80). If it were an issue in this case, we would urge that this is a perfectly reasonable practice of the sort that carriers engage in all the time in deciding whether to enter into through route-joint rate arrangements. But clearly it is not an issue. First, the fact that one carrier does something is obviously no basis for saying that carriers in general ''frequently'' do it. Second, what that single carrier says it does has nothing to do with the Government's assertion about the railroads' ''charg[ing] [motor carriers] rates that exceed open tariffs.'' The only meaning the Government's statement can have is in relation to the sharing of revenue between railroads and motor carriers under Plan I or Plan V arrangements. What the Government apparently means to say is that, in such cases, the railroad's share is ''frequently'' larger than it would receive for per-

forming the same service directly to a shipper under a Plan III or IV service. The Government cites nothing to show that this is "frequently" true. The Examiners' Recommended Report suggests it is not (R. 668-670). See also R. 382-383. But assuming that divisions in some cases are fixed at such a level, as may be the case, that would hardly demonstrate "domination" of the motor carriers by the railroads. As the Government must know, a great number of factors enter into the reasonableness of a sharing of revenue in a joint service arrangement. For example, if the traffic is primarily solicited by the railroad, it is reasonable for the railroad to receive a larger share. Moreover, if the traffic is long-haul traffic of the type as to which motor carriers are not competitive because of their costs, the same result may be true (see R. 331-332). But this is no place to untangle all of the snarls in the Government's argument. The fundamental point here, as in connection with so much of the Government's version of the "facts" respecting TOFC, is that its version has no basis at all in the Commission's report.

c. Since our discussion of the Government's reliance upon facts which are not supported by the report or the record is already extended, we simply list in the margin a representative sampling of additional statements by the Government that we challenge for substantially the same reasons given above.[12]

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[12] (1) "[It is] the railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad . . ." (Br. 42).

(2) "By refusing to deal with the regulated motor carriers . . . the railroads are in a position to dominate the motor as well as the rail segments of piggyback service, or to favor some motor carriers at the expense of others and thereby create unfairness and, perhaps, debilitate competition generally between the railroad and motor-carrier industries" (Br. 22). (The last clause escalates the speculation in a fashion that, presumably because of the introductory "perhaps," is not backed by any attempt at documentation.)

d. In sum, we submit that the Government is attempting to shore up its legal contentions by relying upon facts that, while certainly colorful, cannot be derived from either the Commission's report or the record. As we have indicated, we do not believe that the Government's assertions could be supported by *any* record. But it suffices for present purposes to observe that it is hardly surprising that they are not supported by *this* record, since not until the record was closed did the Commission suggest that it was seriously considering "open tariff" rules.

7. *The District Court proceeding.* The railroad and freight forwarder appellees brought suit in a three-judge federal court in Chicago to set aside the "open tariff" rules. In granting the relief requested, the court's analysis was in outline as follows (R. 17-43): First, the Commission had relied upon section 2 of the Interstate Commerce Act, 49 U.S.C. 2, but that provision was not relevant because it applies only to rate discrimination, not to refusal to afford service, and because it does not regulate relations between carriers, but only between carriers and shippers. Second, under the Act motor carriers and railroads are confined to performance of transportation services by highway and

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(3) "[T]he discrimination that the Commission questioned in this case has many of the same injurious consequences as the traditional forms encompassed by the prohibitions of the Act" (Br. 40).

(4) "[T]he railroads' present policy of either refusing motor carriers any access to piggyback or making it selectively available to them on terms dictated by the railroad constitutes so insidious a form of discrimination" (Br. 42).

(5) "[T]he elimination of motor-carrier competition from the truck segment of piggyback would appear to reflect, not efficiency, but only the railroads' economic power. This is a classic instance of unfair competition" (Br. 44).

(6) "The consequences are not markedly less injurious where the railroad permits motor-carrier participation in piggyback service but at rates so much higher than those charged ordinary shippers as to assure that the competition of the motor carriers will be marginal and that the railroads will skim off the bulk of the profits to be made in the truck segment of the service" (Br. 44-45 n. 28).

rail, respectively, and the exclusive authority for coordination of their services is the through route-joint rate provisions of the statute. 49 U.S.C. 15(3), 316(c). But under those statutory provisions any motor-rail joint service must be offered pursuant to voluntary arrangements between the carriers, whereas the "open tariff" rules involve compulsion. Third, the "open tariff" rules are also incompatible with the provisions of Part IV of the Act that prohibit motor carriers from engaging in freight forwarding. And, finally, the invalidity of the rules was confirmed by the fact that the Commission had departed from a construction of the statute that it had consistently adhered to since 1939. The court did not discuss any of the policy arguments now advanced by the Government, because it evidently had not occurred to anyone that such arguments could be made on the basis of the Commission's report and the record.

Argument

INTRODUCTION AND SUMMARY

Although, as the Government says, "[i]t is generally (albeit not invariably) cheaper, faster and more efficient to move large quantities of freight long distances by rail than by truck" (Br. 18), for the last three decades motor carriers have secured a progressively larger portion of freight revenue. There is no sign that this trend has stopped. Thus, from 1939 to 1959 the motor carriers' revenue increased from 22.81% to 80.27% of the railroads' revenue (R. 316); and despite what the Commission termed the "explosive" growth of TOFC service between 1959 and 1964, the motor carriers nevertheless succeeded in the latter year in passing the railroads in revenue.[13] Moreover,

[13] For the figures for these latter years, see "Statistics of Railways in the United States," published annually by the Commission, and "Transport Economics," October, 1966.

in recent years more and more shippers have turned wholly or partly away from common carrier service of any sort in favor of private carriage.

In order to maintain a reasonably stable competitive position, the railroads have invested large amounts of capital in new forms of equipment and service. One of the technological innovations that the railroads have regarded as promising is TOFC service. By the simple process of transporting upon a rail flatcar an entire truck trailer (or a container that can be mounted upon, and demounted from, a truck chassis), the costly step of loading and unloading freight between truck and train can be eliminated. This cost reduction permits the railroads to compete more effectively with motor carriers for the business of shippers who are not located on rail sidings.

After the Commission in the 1954 *New Haven* decision (*supra* pp. 11-12) laid down the guidelines that were to govern TOFC development—and since it was clear under *New Haven* that railroad investment in TOFC equipment could not, at the motor carriers' option, be turned to the advantage of the motor carriers rather than the railroads—the railroads embarked upon an accelerated program of establishing and promoting TOFC service. While, as we have indicated, that service has not reversed the trend that still runs in favor of the motor carriers, it has at least prevented an even more serious deterioration of the railroads' relative position; and it has in addition stemmed diversion of traffic by private carriage.

The Government does not question the desirability of further expansion of TOFC service. Nor does it suggest that there is anything wrong with the railroads' securing long-haul traffic as to which rail transportation is the most efficient mode. The Government, however, urges that the motor carriers are not getting their fair share of the short-haul and pickup and delivery trucking service that is in-

cident to TOFC service. The Government says that the "open tariff" rules, under which railroads would have to furnish motor carriers with the same TOFC service that they offer to shippers, would cure this evil; and the Government says that the rules are required by the anti-discrimination provisions of the Interstate Commerce Act.

The Government is wrong on all counts:

1. A threshold obstacle to judicial review is the fact that the Commission did not adequately explain the basis for the "open tariff" rules. Most of the Commission's discussion (Rep. 327-337) was devoted to rebutting contentions that the rules would be antagonistic to the National Transportation Policy, and to distinguishing some, and overruling other, of the Commission's prior decisions holding that motor carriers could not employ a railroad's "open tariff" even with railroad consent. As to the authority of the Commission to *require* the railroads to treat motor carriers as if they were customers, however, the Commission adverted only to section 2 of the Act, 49 U.S.C. 2. But in its brief discussion of section 2, the Commission did not explain why—or even explicity state *that*—section 2 obliges the railroads to offer motor carriers the same service as it offers shippers. Indeed, the principal thrust of the Commission's discussion of section 2 appears to be that the fact that a motor carrier is a competitor of a railroad would not "compel" the conclusion in every case that section 2 would be inapplicable (Rep. 335-356). This is hardly the same as saying that the difference between a shipper and a motor carrier is *always irrelevant* under section 2—the determination that must be made to support the "open tariff" rules. This ambiguity in the Commission's report requires that the rules be set aside under the principle established in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 94. Moreover, the applicability of *Chenery* is under-

scored by the fact that the Government, in its brief in this Court, relies upon statutory provisions—sections 3(1) and 1(4) of the Act, 49 U.S.C. 3(1), 1(4)—and allegations of fact that were nowhere mentioned by the Commission.

2. The statutory provision adverted to by the Commission, section 2, is not applicable for two reasons. First, on its face it proscribes discrimination only in terms of compensation received by the railroads, not in terms of service provided by railroads. It is section 3(1) that relates to discrimination in service, not section 2, as the Commission and the courts have consistently stated. But the "open tariff" rules are designed, according to the Government, to remedy an alleged discrimination in service, not in rates. Second, section 2 has long and often been held not to govern relations between competing carriers, but only relations between carriers and their shippers. Moreover, the infirmity of the Government's view—that section 2 requires that motor carriers be accorded the same treatment as shippers—is exposed by the inequality that would be produced by the "open tariff" rules. While motor carriers would always secure all benefits made available to shippers, they could receive greater benefits than shippers by virtue of entering into through route-joint rate arrangements with railroads. Moreover, they could secure a like advantage over freight forwarders, who, by virtue of their special status as carrier-shippers, may employ the TOFC plans made available to shippers but may not enter into through route-joint rate arrangements with the railroads.

3. Section 3(1) cannot be relied upon by the Government to support the rules, since the Commission did not rely upon it. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169. In any event, the provision is inapplicable because by its terms it "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description." That this

proviso means exactly what it says is confirmed by its legislative history, which indicates that the proviso was designed to reflect the long line of decisions holding that section 3(1), just as section 2, is limited to governing relations between carriers and shippers, not between carriers and carriers. And if neither section 2 nor section 3(1) is relevant, then neither is the portion of section 1(4) relating to the railroads' obligation to provide reasonable service. Sections 2 and 3(1) are the anti-discrimination provisions, not section 1(4); and the Commission's sole justification for the rules, to the extent it gave any, relates to alleged discrimination.

4. The invalidity of the rules is further confirmed by their incompatibility with the through route and freight forwarder provisions of the Act.

a. Under section 216(c), 49 U.S.C. 316(c), the Commission cannot compel the establishment of through routes between motor carriers and railroads. The Commission's conclusion that no compulsion is involved under the rules because the railroads could abandon their multi-million dollar investment in TOFC service is wholly unrealistic. This was the Commission's only asserted basis for escaping the impact of the through route provision, and since it is meritless the rules should be deemed inconsistent with that provision. Moreover, the Government's assertion in this Court that no through routes would be involved under the "open tariff" rules is immaterial, since the through route statutory provision is the exclusive method provided by the statute for the coordination of rail-motor service. Finally, the Government's contention could not in any event be accepted, since the Government does not, and cannot, explain why the service provided under the "open tariff" rules would *not* involve through routes, whereas the service provided under Plan I, as held by the Commission, *does* involve through

routes. The two types of service are identical, but for the fact that one is required by the Commission and the other is voluntary.

b. Under Part IV of the Act, motor carriers cannot be given freight forwarder permits. However, under the "open tariff" rules motor carriers could operate exactly as do freight forwarders. That is, they could consolidate less-than-truckload shipments into truckload shipments, employ the railroad to perform the line-haul transportation (and under Plan II even the terminal pickup and delivery service), and make their profit on the spread between the charges paid by their shippers and the volume rate charged by the railroad. Accordingly, the "open tariff" rules are in conflict with Part IV.

5. Finally, the rules do not further the National Transportation Policy. The Government's contention in this respect is, as we have demonstrated, based upon a recital of facts that cannot be supported on the basis of the Commission's Report or the record. For our part, we suggest that the rules would have a debilitating effect on railroad service because they would permit motor carriers to shift part of their legitimate costs to the railroads. Motor carriers would not employ the "open tariffs," of course, unless it would advantage them to do so. A typical instance in which this would be the case would be where the motor carrier did not have a return load for a shipment. Thus, motor carriers could thrust upon railroads their return load problems. Motor carriers could also use TOFC to meet their peak load requirements, thereby requiring the railroads to have more standby equipment and motor carriers less. The predictable result would be a rise in TOFC costs, and hence in TOFC rates. While motor carriers would, of course, benefit competitively, this result hardly seems consonant with the National Transportation Policy's

mandate for administration of the Act so "as to recognize and preserve the inherent advantages of each" mode of transportation.

I

THE "OPEN TARIFF" RULES ARE INVALID BECAUSE THE COMMISSION'S REPORT DOES NOT DISCLOSE THE GROUNDS UPON WHICH THEY ARE BASED AND BECAUSE THE GOVERNMENT CANNOT NOW SUPPORT THE RULES ON GROUNDS THAT DO NOT APPEAR IN THE REPORT.

Before analyzing the statutory provision on which the Commission may have based the "open tariff" rules, we discuss whether such an analysis need be made at all in order to dispose of this case. We say it need not, for the Commission at no point explained the statutory rationale of its decision adequately. This failure is fatal, for "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U.S. 80, 94. See also, *e.g.*, *Phelps Dodge Corp.* v. *Labor Board*, 318 U.S. 177, 197; *Automatic Canteen Company* v. *FTC*, 346 U.S. 61, 81; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago M. St. P. & P.R. Co.*, 294 U.S. 499, 510-511; *Northeast Airlines, Inc.* v. *C.A.B.*, 331 F.2d 579, 586 (1st Cir. 1964); Administrative Procedure Act, 5 U.S.C. §§1003(b), 1007(b).

The ten relevant pages of the Commission's Report (327-337) can be searched in vain for the statutory provision that is said to require the railroads to treat competing carriers as if they were shippers. The first few pages (327-330) are devoted to a general—and in our view, erroneous—evaluation of the merits of the "open tariff" rules. Nowhere in

the discussion does the Commission suggest that the desirability of the rules would be a statutory justification for their promulgation. The next portion of the Report (pp. 330-334) consists of an effort to distinguish—later acknowledged as a determination to overrule (p. 336)—prior decisions. Inasmuch as those decisions stood for the proposition that the arrangements contemplated by the "open tariff" rules are *prohibited* even *with* railroad consent, it is hardly surprising to find that the Commission's discussion suggests no basis for concluding that these arrangements are *mandatory without* railroad consent. Next (pp. 334-335), the Commission attempts to refute the contention that the rules are invalid because they will result in the compulsory establishment of through routes. Obviously, if the Commission is wrong in this respect (about which we say more later) the rules are invalid. But even if the Commission is correct, all that is established is that the through route provisions of the Act do not *bar* the rules, not that they support them. Finally, in two short and cryptic paragraphs (pp. 335-336), the Commission adverts to the only statutory provision that might be thought to be a basis for the Commission's action—section 2 of the Act, 49 U.S.C. §2. We discuss later the patent inapplicability of section 2. At this point we note simply that nowhere in its discussion does the Commission indicate why section 2 justifies—or indeed explicitly *that* section 2 justifies—a rule requiring the railroads to treat truckers as if they were shippers.

There appear to be three different—and partly inconsistent—notions expressed in the Commission's discussion of section 2. The first is that its applicability should be determined on a case by case basis. Thus:

> "... It might be argued, however, that service provided for a competitor could not be said to be performed

'under substantially similar circumstances and conditions' as that provided for private shippers.

"Whether two or more transportation services were performed 'under substantially similar circumstances and conditions' would be a matter of fact to be determined in each individual case as it arose, but we see no reason why the fact that the user of a service was another carrier rather than a private shipper would *compel* the conclusion that dissimilar circumstances and conditions were present." (Rep. 335-336) (emphasis supplied).

This appears to mean only that in each case where a motor carrier seeks to require a railroad to offer it TOFC service because the railroad offers such service to a shipper, the difference between a shipper and a motor carrier *will not "compel"* a decision in favor of the railroad. In other words, a decision in favor of the motor carrier may be *permissible.* This is hardly the same thing as saying that the difference between a shipper and a motor carrier *is always irrelevant* under section 2 and that section 2 therefore *will "compel"* a decision in favor of the motor carrier, which is the holding that must be made to support the "open tariff" rules.

Again, in describing its conclusions, the Commission stated that "when TOFC service is offered by a rail carrier to the public generally, *there is nothing to preclude* its use by motor or water common or contract carriers . . ," and that to the extent this holding departed from *New Haven,* the latter case was overruled (Rep. 336). But this appears to bear only upon that portion of the *New Haven* decision which held that motor carriers could not utilize open tariff TOFC service *even with the consent of the railroads.* See *supra,* p. 11. But to say that "there is nothing to preclude" motor cariers from utilizing such service does not

show how section 2 *requires* a railroad to offer such service to its competitors against its will.

It is only the rules themselves, together with a brief discussion of *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740, that suggest a conclusion by the Commission that section 2 *requires* a railroad to treat motor carriers as if they were shippers. Where this is combined with a contradictory suggestion that the problem should be dealt with on a case by case basis, and another suggestion that all that is at stake is whether motor carriers may be *permitted* by the railroads to use "open tariff" TOFC service, we submit that the Commission has failed to measure up to the requirement that the grounds for its decision be set forth with clarity so that the courts may effectively perform their task of review—a requirement that applies with special force in a case of this importance where the Commission has overridden a long line of its prior decisions. See *e.g.*, *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-654.

Finally, the pertinence of the *Chenery* rule in the case at bar is underscored by the character of the Government's brief, which ranges far beyond anything contained in the Commission's report both by way of facts and by way of law. We have already discussed the Government's departure from the report in terms of findings of fact; in the next portion of our brief we deal with the Government's effort to defend the rules on the basis of statutory authority that was not even mentioned by the Commission.

II

THERE IS NO STATUTORY AUTHORITY FOR THE "OPEN TARIFF" RULES.

As we have indicated, the only statutory basis for the "open tariff" rules that was even adverted to by the Commission was section 2 of the Act. The Government here, however, says that it "need not stop" with section 2, but may in addition rely on section 3(1) and section 1(4), 49 U.S.C. 3(1), 1(4). But in the lower court the Government *did* stop at section 2, where it agreed with appellees that "[a] reading of the Commission's report makes clear that it was this Section [section 2] upon which it relied" (Govt. Br. p. 15). The Government does not explain why it now feels free to advance statutory authority which it did not urge in the lower court and which the Commission did not even cite. There is no acceptable explanation. The Commission's failure to mention sections 3(1) and 1(4) cannot be regarded as an oversight, since as we show later there are obvious impediments to their use in this case (see *infra*, pp. 48-54). Accordingly, as this Court has held, "The courts may not accept appellate counsel's post hoc rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-169.

But even were this not true, the Government's position would not be advanced. As we show in this portion of our brief, there is *no* statutory provision that supports the "open tariff" rules.

A. *Section 2 Is Inapplicable.*

The only statutory provision relied upon by the Commission—section 2—is inapplicable (1) because it deals only with discrimination in rates, whereas the "open tariff"

rules deal with alleged discrimination in service, and (2) because it does not govern relations between railroads and motor carriers, but only relations between railroads and their shippers.

1. *Section 2 deals only with discrimination in terms of ompensation.* Assuming *arguendo* that there is discrimination in the railroads' not offering Plans II, III, and IV to competing carriers, it is a discrimination in the form of refusing to offer service, not a discrimination in the form of collecting a greater amount of compensation from one person than from another for performing the same service. But section 2 on its face deals only with discrimination of the latter type—rate discrimination.[14] Where the former type of discrimination is involved, it is the more encompassing section 3(1) of the Act that is relevant,[15] not section 2.

Not only is this the plain meaning of the statutory

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[14] "*If any common carrier* subject to the provisions of this part *shall,* directly or indirectly, by any special rate, rebate, drawback, or other device, *charge, demand, collect, or receive from any person* or persons *a greater or less compensation* for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, *than it charges, demands, collects, or receives from any other person* or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful" (emphasis supplied).

[15] " (1) *It shall be unlawful for any common carrier* subject to the provisions of this part *to make, give, or cause any undue or unreasonable preference or advantage* to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, *in any respect whatsoever;* or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (emphasis supplied).

language, but the courts and the Commission have consistently so read these dual anti-discrimination provisions of the Act. As the Commission said in one of its early decisions dealing with these provisions, *Rail & River Co.* v. *B. & O. R.R. Co.*, 14 I.C.C. 86, 88-89 (1908):

> " . . . The former [section 2] assures to shippers an equality of rates for the transportation of property under substantially similar circumstances and conditions; and the latter [section 3(1)] assures to them an equality in the opportunity to use the rates, facilities, and services of carriers. One right supplements the other. An equality in rates without an equal opportunity to use the facilities of carriers would fall far short of the general objects sought to be accomplished by the Congress. On the other hand, the right to impartial treatment by carriers in the transportation of their merchandise would mean little to shippers if not accompanied by an assurance of an equality also in rates. . . ."

Thirty years later the Commision continued to adhere to the same position. *Joseph A. Goddard Realty Co.* v. *New York C. & St. L. R. Co.*, 229 I.C.C. 497 (1938), is directly in point. There the complainants charged a railroad with a violation of section 2 in that, while it performed switching services for other shippers nearby, it refused to perform switching services for complainants. The Commission held that there could be no violation of section 2 because the charge was one of refusal to perform service, not of rate discrimination.[16]

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[16] "Section 2 . . . prohibits a carrier from charging one person a greater or less compensation for any service rendered or to be rendered in the transportation of property than it charges any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and con-

Neither the Commission nor the courts have deviated from this interpretation of section 2. See *Wight* v. *United States*, 167 U.S. 512, 518 (Section 2 prohibits "any rebate or other device by which two shippers . . . are compelled to pay different prices."); *United States* v. *Delaware, L. & W. R. Co.*, 40 Fed. 101, 103 (C.C.N.D.N.Y. 1889) (Section 2 "relates to unjust discrimination in rates. The latter [section 3] is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers. . . ."); *United States* v. *Hanley*, 71 Fed. 672, 673 (N.D. Ill. 1896) ("There can . . . be no conviction under this section [2] until it is alleged and proven that an advantage in rates has been given. . . ."); *United States* v. *Vacuum Oil Co.*, 153 Fed. 598, 605 (W.D.N.Y. 1907) ("The gist of the offense described by section 2 is the payment of a different rate for performing a like service. . . . This section [3] is broader than section 2, and includes . . . any advantages in facilities and conveniences given or received."); *Osborne McMillan Elevator Co.* v. *Mpls., St. P. & S. Ste. M.R.R. Co.*, 306 I.C.C. 155, 160 (1959) ("The discrimination forbidden under section 2 of the act must be caused by charging one person more than another for performing a like and contemporaneous service. . . ."); *Pacific Lumber Co.* v. *N.W.P.R.R. Co.*, 51 I.C.C. 738, 760 (1918); *Board of Trade, City of Chicago* v. *Grand Trunk W. R. Co.*, 255 I.C.C. 141, 148 (1943).

In the face of this settled view that it is section 3(1) which imposes the obligation to render transportation service to all persons similarily situated once it is provided to any person, and that section 2 imposes only the obligation

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ditions. The complaint herein is that defendant, while switching connecting line traffic for other industries at Muncie, declines to switch such traffic for complainants. Therefore the facts present no case of unjust discrimination under section 2." *Id.*, at 500.

to charge equal rates for the same service, the Commission artfully recast section 2 so as to find therein an obligation to render service.[17] The Commission's version of section 2 is that it "requires rail carriers . . . to *make* 'like and contemporaneous *service* in the transportation of a like kind of traffic under substantially similar circumstances and conditions' *available* to any person at a charge no greater and no less than that received from any other person" (Rep. p. 335) (emphasis supplied). Section 2 does not refer to availability of service; but the Commission, so as to make it appear that section 2 does relate to discrimination in making service available, inverted the statutory terms, putting at the forefront the language respecting service that in the statute appears simply as the standard for determining when there is an unjust *rate* discrimination. Such a bald attempt to rewrite the statute cannot, we submit, succeed. Section 2 does not authorize the Commission to compel the railroads to perform the *services* that would be required of them by Rules 2 and 3.

In this Court, the Government tries a different tack. It does not suggest that there is any ambiguity in the language of section 2. It hardly could. Rather, in a curious inversion of the rule that the greater includes the lesser, the Government argues that the "greater discrimination involved in a flat refusal to provide service" should be included in the lesser discrimination of charging different rates (Br. pp. 30-31). With no case law and no statutory history to support it,[18] the Government's contention

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[17] We show later that section 3 would not be applicable in this case either, even had it been relied upon by the Commission.

[18] The Government manages (Br. 30-31) a gingerly citation of one sentence in this Court's opinion in *Interstate Commerce Commission* v. *Delaware, L. & W. R.R. Co.*, 220 U.S. 235, 252. But the case was a *rate* discrimination case and the Commission and the Court accordingly relied upon section 2 of the Act. All that the Court said in the sentence referred to by the Government was that a discrimination in service may achieve

amounts to nothing less than an appeal that the statute be rewritten. Moreover, whatever force there might be to the Government's plea in other circumstances, there is none here, for the Congress has dealt with the problem of discrimination in service in section 3 of the Act. That provision bars "any unreasonable preference or advantage" "in any respect whatsoever." [18] Thus, there is no occasion to stretch the language of section 2 beyond its settled meaning.

That is not to say that the Commission did not have a reason for attempting to extend the scope of section 2 so that it would overlap section 3. It did have such a reason, for, as we show later, the difficulty with section 3 is that it is not applicable to a carrier's treating its customers more favorably than its competitors. But the Commission's effort to escape the limitation of section 3 should not succeed, for two reasons. First, as we show in the next portion of this brief, the same limitation also governs section 2. And, second, an agency simply should not be permitted to rewrite a statute in order to avoid a legislatively imposed barrier to the end the agency wants to achieve.

This, then, is as far as the Court need go: the Commission's rules must be defended on the basis of section 2 because that is the only authority relied upon by the Commission, and section 2 is inapplicable because, in refusing to allow the motor carriers the use of TOFC service made available to shippers, the railroads are not "collect[ing] . . . a greater or less compensation" from the motor carriers than they are collecting from the shippers.

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the same purpose as a discrimination in rates. That is certainly true. But since, as we point out in the text, section 3 of the Act deals with discrimination in service, there is no basis for reading into section 2 a prohibition against such discrimination. And certainly this Court did not in *Delaware, L. & W. R.R.* suggest that there was.

[18] For the text of section 3(1) see Appendix p. 3, *infra*.

2. *Section 2 does not apply where the alleged discrimination is against competing carriers.* Having discussed the *type* of discrimination prohibited by section 2 and shown that section 2 does not prohibit discrimination involved in refusing to provide service, but only the discrimination involved in collecting unequal compensation for equal services, we turn to a discussion of the *persons* who are protected against discrimination by section 2.

The Government's view is that section 2 absolutely bars all "'personal' discrimination—refusal to accord equal service because of the identity or interest of the sender" (Br. 34). Thus, says the Government, "where two senders (one a conventional shipper, the other a motor carrier) tender the same cargo (a truck trailer) for the same flatcar service over the same route for the same distance, the rule of equality requires the railroad to treat both patrons the same" (Br. 35).

The trouble with the Government's view is, first, that it would not serve to uphold the Commission's rules even if it were right and, second, it is wrong.

a. The Government's view of section 2 could not sustain the "open tariff" rules because those rules themselves insure that the railroad will not be required to "treat both patrons the same." Under those rules, while both motor carrier and shipper will be able to use the "open tariff" TOFC service on the same basis, the motor carrier—unlike the "conventional" shipper—will also continue to enjoy the right to enter into joint service arrangements with the railroad (Plans I and V) in which the "cost" to the motor carrier of the rail portion of TOFC service may be less than the "cost" to a shipper for precisely the same physical service. Thus, as the lower court noted (R. 28-29), the railroads will be able to "discriminate" against shippers in favor of motor carriers by offering shippers less ad-

vantageous terms than motor carriers, but not against motor carriers in favor of shippers.[19]

Similarly, the "open tariff" rules would prefer motor carriers to freight forwarders. Freight forwarders have always filled the role of carrier *vis a vis* their customers and of shipper *vis a vis* the carrier employed to perform the line haul transportation. See *Chicago, Milwaukee, St.P. & P.R.R. Co.* v. *Acme Fast Freight Inc.*, 336 U.S. 465; *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344; *Forwarder Volume Commodity Rates Between Chicago and New York*, 308 I.C.C. 455, 461 (1959). Accordingly, they must be treated by the railroads the same as any other shipper. *Interstate Commerce Commission* v. *Delaware, L. & W. R.R.*, 220 U.S. 235. On the other hand, the railroads may not *prefer* freight forwarders to other shippers by entering into through route-joint rate arrangements that might result in divisional arrangements under which freight forwarders would in substance secure railroad transportation at rates lower than those charged other shippers. *Chicago, Milwaukee, St.P. & P.R.R. Co.* v. *Acme Fast Freight, Inc., supra*, at 478. This means, in connection with TOFC, that freight forwarders may employ Plans II, III, and IV, but they may not enter into Plan I or Plan V arrangements with railroads.

Under the "open tariff" rules, the competitive relationship between motor carriers and freight forwarders would be seriously disrupted. The motor carriers would be able to use Plans II, III, and IV, as would the freight forwarders. But the freight forwarders, like other shippers, would *not* be able to enter into Plan I and Plan V arrangements.

Yet another strange result of the rules arises in relation

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[19] The Government admits the facts, but denies that there is anything incongruous about them (Br. 62 n. 39). The Government's argument, however, simply defies analysis.

to a portion of the *New Haven* decision that the Commission did not discard. In *New Haven*, the Commission held that a railroad engaging in Plan I or Plan V service with some motor carriers could refuse to establish comparable arrangements with other motor carriers because section 3(4) of the Act, 49 U.S.C. 3(4), respecting discrimination by railroads among connecting carriers, does not apply to motor carriers. 293 I.C.C., at 105. Thus, under the new rules, railroads may treat one motor carrier differently than another, but, says the Government, they may not treat shippers as a group more favorably than motor carriers as a group. Surely the Congress could not have intended that the railroads be free to "discriminate" among competing motor carriers but not between non-competing truckers and shippers.

None of these results of the "open tariff" rules can be harmonized with the Government's notion that the anti-discrimination provisions of the Act forbid any consideration of the character of the "shipper." If the Government were correct, the railroads could not treat motor carriers better than shippers; yet they would be free to do so under the rules that the Government seeks to sustain. More significantly, the railroads could not treat motor carriers better than their competitors the freight forwarders; yet they would be free to do so under the rules. They could not treat one motor carrier better than another; yet, once again, they would be free to do so under the rules. Since these results of the "open tariff" rules do not square with the Government's simplistic view of section 2 any better than they do with common sense, there is good reason to suppose that the Government's construction of section 2 is unsound as a matter of law. As we now demonstrate, it is.

b. The Government has not cited a single decision that

holds that section 2 requires that carriers treat competing carriers in the same fashion that they treat customers. The Government could not cite any such decision, for an unbroken line of authority is to the contrary. In the *New Haven* case, the Commission was faced with the question whether a railroad having joint TOFC arrangements with some motor common carriers could refuse to offer comparable service to contract carriers, private carriers (shippers), or freight forwarders. The Commission rejected the shippers' contention that sections 2 and 3(1) require equality of treatment as between shippers and motor carriers in the offering of TOFC service. As the Commission phrased it:

> "The shipper interests contend that the provisions of sections 2 and 3(1) . . . preclude the railroads from confining this service to the motor common carriers. In our view, however, those provisions are applicable only to those who stand, as to the railroad, in the relation of shippers." 293 I.C.C., at 110.

This construction of the scope of section 2 was consistent with all other decisions that we have been able to discover. See *Consolidated Mining & S. Co. of Canada* v. *N.Y. Central R.R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Sioux City & N.O. Barge Lines, Inc.*, v. *Chicago & N.W. Ry. Co.*, 303 I.C.C. 537, 562 (1958); *Federal Barge Lines, Inc.* v. *Alton & S.R.*, 303 I.C.C. 669, 679 (1938); *Eastern Central M. Carriers Ass'n* v. *Baltimore & O.R. Co.*, 314 I.C.C. 5, 50 (1961), *aff'd sub nom. Cooper-Jarrett, Inc.* v. *United States*, 226 F. Supp 318, 376 U.S. 6 ("It should be observed, also, that sections 2 and 3(1) are intended to protect shippers, not competing carriers."). *Cf. Texas & Pacific Railway Co.* v. *Interstate Commerce Comm'n*, 162 U.S. 197, 219 (1896).

To these decisions must be added many more that relate to section 3 rather than to section 2. Because, as we have

pointed out, section 3 is broader in its reach, litigation under it has been more frequent than under section 2. As we show later in this brief (*infra* pp. 48-52), all of that litigation has produced a single conclusion: section 3 was not designed to protect competing motor carriers. If this is so, then the same conclusion applies to section 2, because, as this Court has stated and as the Government's brief implicitly concedes, "[T]he provisions of §§ 2, 3 and 4 of the act being in *pari materia* require harmonious construction and therefore they should not be applied so that one section destroy[s] the others. . . ." *United States* v. *Louisville & N.R.R. Co.*, 235 U.S. 314, 325-326. In short, Vice Chairman Webb was quite correct in the case at bar when he said in dissent: "The Commission's interpretation of section 2 leads to this astonishing conclusion: that 'discrimination' as between carriers, which is expressly permitted under section 3(1) and its counterpart section 216(d) [relating to discrimination by motor carriers], is condemned by section 2" (Rep. 393).

It remains to discuss the decisions cited by the Government in support of its reading of section 2. The Government says that the case "most nearly in point" is *Interstate Commerce Commission* v. *Delaware, L. & W.R.R.*, 220 U.S. 235. While that decision is certainly relevant, its real importance is that it discloses the infirmity of the Government's position. That decision, together with others we cited above (*supra*, p. 41), establishes that under existing legislation a freight forwarder is *always* to be treated by railroads as a shipper, although it is a carrier to its patrons. The consequence is that it must always pay the same rates as other shippers and can never enter into joint rate arrangements with the railroads. But, as we have already pointed out (*supra*, p. 41), if that be so then the "open tariff" rules would actually *permit* discrimination between

motor carriers and freight forwarders; for motor carriers could take their choice between "open tariffs" or Plan I or Plan V arrangements where available, whereas the freight forwarders would be confined to "open tariffs." Since the Government's reading of the *Delaware, L. & W.R.R.* decision produces such an inequitable result, it is likely that the Government's reading is wrong. It is.

In *Delaware,* the railroads argued that they could deny carload rates to forwarders proffering consolidated shipments on the ground that, if the shipment be considered in terms of the ownership of its components, it would consist of a number of less-than-carload lots. This effort of the railroads to fix charges on the basis of a wholly conceptual division of a single physical shipment according to the real ownership of its components was rejected by the Commission and the Court. In the case at bar, however, the right of the railroads to deny TOFC service to motor carriers does not turn upon the "mere circumstance"—to use the Court's phrase in *Delaware*—that the motor carrier does not own the freight. Rather, the railroads refuse "open tariff" TOFC service to motor carriers for the quite different—and as we show later quite sound—reason that otherwise the motor carriers would be enabled to better their competitive position *vis a vis* the railroads by capitalizing on the inherent cost advantages of railroad transportation. Moreover, freight forwarders have always been regarded as "conventional shippers," to use the Government's term. See *supra p.* 41. Accordingly, a decision which requires that they be treated the same as other shippers can hardly be taken as authority for the proposition that motor carriers, who have never been regarded as "conventional shippers," should receive like treatment.

What the Government has not cited, and what it cannot cite, is a single decision holding that section 2 requires

motor carriers to be given the same services and rates as shippers or freight forwarders.[20] In point of fact, when the question of equal treatment as between motor carriers and freight forwarders has been put to the Commission, it has held that there is a significant difference between them. Thus, in the *New Haven* case, at the same time that the Commission held that railroads had to permit forwarders to use TOFC service available to other shippers, it also held that railroads did *not* have to offer forwarders the same TOFC service available under joint rate arrangements with motor carriers. See also *Advancing Freight Forwarder Charges*, 281 I.C.C. 1, 5 (1951), where the Commission held that railroads did not have to treat freight forwarders and carriers alike with respect to assessment of a fee for certain services in connection with the collection of charges.

Apart from *Delaware*, the other decisions cited by the Government are of the most distant relevance, since they deal only with discrimination between "conventional shippers" and not with whether motor carrier competitors of railroads are entitled to claim section 2 rights against the railroads. Thus, for example, in *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U.S. 144, 166, the Court reaffirmed its holding in *Wight* v. *United States*, 167 U.S. 512, that a railroad cannot justify a rate discrimination among shippers on the ground that, in the case of the favored shipper, it was merely matching a low rate of a competing carrier. It was in this sense that the Court stated,

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[20] Of course a carrier may legitimately act as a shipper in tendering its own goods or equipment to another carrier for transportation; and in such a case the anti-discrimination provisions of the Act naturally require that, as to such a movement, the tendering carrier be treated simply as a shipper. This was the situation in the decision cited by the Commission (Rep. 336), *Louisville & Nashville R.R. Co.* v. *United States*, 282 U.S. 740, where the railroads tendered their private cars to other railroads for transportation, not to fulfill any transportation contract with another shipper, but only on the shipper-railroad's own account.

"The phrase 'under substantially similar circumstances and conditions' . . . refers to the matter of carriage, and does not include competition between rival routes." 168 U.S., at 166. The Court's statement respecting the irrelevance of competition between two carriers for a shipper's traffic as a justification for *favoring that shipper over other shippers* can hardly control where the question is the propriety of *favoring all shippers over the competing carrier.* It is one thing to say that *a shipper* should not be discriminated against because of competition between carriers, and it is quite another to say that the *competing carrier* should not be "discriminated" against. In the one case, the victim of the discrimination—the shipper—has nothing to do with the competition between the contending carriers; in the other, the "victim" of the discrimination—the competing carrier—has everything to do with the competition and should not be heard to complain that he does not have the same rights as the shipper.

For the sake of completeness, we add that even the law of discrimination between shippers is not nearly as clear as the Government claims. It simply cannot be said that "[i]t is irrelevant in such cases that the discrimination is required to meet competition" (Br. 32). Thus, in *Texas & Pacific Railway Co.* v. *Interstate Commerce Comm'n,* 162 U.S. 197—a decision receiving a "but cf." citation from the Government (Br. 29 n. 18)—this Court held that under section 2 the competition of water carriers warranted the railroads in maintaining lower rates for the transportation of shipments that originated outside the country than for shipments that originated within the country. Moreover, in a series of recent decisions which are certainly well known and widely discussed in the transportation industry, the Commission has applied the *Texas & Pacific* principle to justify under section 2 rate differentials designed by the carriers to better their competitive position. See *Coal to*

New York Harbor Area, 311 I.C.C. 355 (1960); *Coal from Ill., Ind., and Ky. to Illinois and Indiana*, 308 I.C.C. 673, 678 (1959); *Reduced Rates on Coal from the East to the Northwest*, 292 I.C.C. 119, 137 (1954); *Koppers Co., Inc.* v. *Chesapeake & O. Ry. Co.*, 303 I.C.C. 383, 394 (1958), *aff'd*, 166 F. Supp. 96.

In sum, the only statutory authority mentioned by the Commission in support of its rules, section 2 of the Act, is inapplicable both because it is restricted to discrimination in terms of compensation and because it does not require equal treatment of shippers and motor carriers. Moreover, as we show next, even if the other section now relied upon by the Government for the first time, section 3, could be considered, it too would not justify the rules.

B. SECTION 3 IS INAPPLICABLE

The Government urges that section 3(1) of the Act, 49 U.S.C. 3(1),[21] sustains the validity of the "open tariff" rules. The Government does not suggest why, if its construction of section 3(1) is correct, the Commission failed to rely upon that section in its Report. As we have pointed out, since rate discrimination is not in issue, it would have been much more appropriate for the Commission to have cited section 3(1) rather than section 2. The explanation is clear enough: The Commission did not mention section 3(1) because it did not share the Government's present

[21] "(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

view of the reach of that provision, probably because by its own terms section 3(1) "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

The Government attempts to avoid the impact of this proviso to section 3(1) by relying upon legislative history which it says establishes that "The sole purpose of the proviso . . . was to make clear that a railroad had no standing to complain that it was unreasonably prejudiced or disadvantaged because a competing motor carrier was charging a lower rate" (Br. 37). We deal in a moment with that legislative history, which supports our position rather than the Government's. At the outset, however, we note that there is no warrant for going behind the language of the proviso, for that language is perfectly clear. When the Congress says that the anti-discrimination provision "shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description," there is no basis for adding, "but only where the discrimination, prejudice, or disadvantage consists of one carrier's undercutting another carrier's rates and not where the discrimination takes any other form." As written, the proviso clearly applies here: The complaint is that the refusal of the railroads to permit truckers the use of TOFC service which is available to shippers is discriminatory. That is a claim of "discrimination, prejudice, or disadvantage to the traffic of [another] carrier," and consequently is the type of "discrimination" that the Congress excluded from the scope of section 3(1).

The only item of legislative history cited—but not quoted—by the Government is a statement of Senator Wheeler in explanation of a proviso in section 216(d) of the Motor Carrier Act of 1935, 49 U.S.C. 316(d). The proviso to section 3(1) was added in 1940, and it was, as the Government says, evidently borrowed *verbatim* from section 216(d).

Senator Wheeler's remarks are set out in full in the margin.[22] He did say, as the Government suggests, that the proviso was "added to meet the objection . . . that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage." But, while such "objections" may have been the particular reason that prompted the Congress to add the proviso, the Congress certainly did not draft the proviso so as to deal merely with that single sort of "discrimination."

Moreover, Senator Wheeler immediately added, with respect to the fear of some that section 216(d) could be given a construction that would permit railroads to claim rate discrimination by motor carriers: "This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since 1887, and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons. However, . . to make assurance double sure, this provision was added."

Thus Senator Wheeler thought that section 3(1) simply

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[22] "Paragraph (b) . . . prohibits unjust discrimination or undue prejudice or disadvantage. The Committee has added a provision that this prohibition shall not be construed to apply to the traffic of any other carrier of whatever description.

"In other words, some of the truck and bus operators were afraid that the railroads would come in and complain, and we added this provision so as doubly to protect the truck and bus operators.

"This provision is added to meet the objection of certain interests that the original paragraph might have been construed so as to make it unlawful for a motor carrier to charge a rate which would place a rail carrier or any other carrier at a disadvantage. *This contention is not well founded in our judgment inasmuch as the provisions of this paragraph are substantially the same as those in section 3(1) of the Interstate Commerce Act, which has been in effect since* 1887, *and have always been interpreted as covering unequal and unjust treatment by a carrier of its patrons.* However, as I said, to make assurance double sure, this provision was added." 79 Cong. Rec. 5856. (Emphasis supplied.)

could not, under well established precedent, be called into service by a carrier, because it protected only a carrier's "patrons." We submit that there could hardly be a clearer expression of intent both that the proviso was designed to do exactly what it says—*i.e.*, to exempt broadly from coverage the relations between carriers—and that this design was based upon the understanding that, so construed, the proviso reflected existing law under section 3(1).

Senator Wheeler's understanding of existing law, furthermore, was quite correct. In a long line of cases prior to the 1935 legislation, the Commission had held that "a situation of prejudice or preference between common carriers is not comprehended by the provisions of section 3(1)." *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell Telephone Co.*, 183 I.C.C. 771, 774 (1932). Moreover, a number of those cases involved facts quite similar to those in the case at bar. Thus, in *Quanah, A. & P. Ry. Co.* v. *A., T. & S.F. Ry. Co.*, 205 I.C.C. 253 (1934), which involved a claim of discrimination by virtue of one carrier's refusal to join with another in providing a service, the Commission found no violation of section 3(1) because the provision "applies only to shippers and receivers of freight." *Id.*, at 261. Similarly, in *Nicholson Universal S.S. Co.* v. *Pennsylvania R.R. Co.*, 203 I.C.C. 637, 647 (1934), the Commission held section 3(1) inapplicable to a complaint by a water carrier that rail carriers had refused to enter into through routes and joint rates with it on the same basis as they had with competing water carriers. In *Hoboken Manfacturers' R.R. Co.* v. *Abilene & S. Ry. Co.*, 248 I.C.C. 109, 119 (1941), the Commission rejected a railroad's contention based on section 3(1) that the respondent railroads had refused to furnish the complainant with certain equipment that it was furnishing to other carriers. And in *Oklahoma-Arkansas Telephone Co.* v. *Southwestern Bell T. Co.*, *supra*, decided when telephone companies were subject

to regulation by the Interstate Commerce Commission, the Commission held section 3(1) inapplicable to a complaint that the respondent refused to allow the complainant to use its toll lines while permitting another telephone company to use its lines.[22]

These decision, together with others such as *New Haven*, already cited in connection with our discussion of section 2 (*supra*, pp. 42-44), establish that neither section 3(1) nor section 2 would have been applicable in the case at bar prior to the enactment of the section 3(1) proviso. Since the legislative history indisputably discloses that the Congress intended the proviso to be read in the light of those prior decisions, the proviso should be given its literal meaning. Under that meaning it is, as Senator Wheeler put it, "double sure" that section 3(1) does not govern relations between carriers. Moreover, since, as we have also indicated, section 2 must be construed in the light of section 3, the proviso to section 3 reinforces our view respecting the inapplicability of section 2.

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[22] See also *Kansas City S. Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I.C.C. 291, 296 (1935); *Oregon Short-Line & U.N. Ry. Co.* v. *No. Pacific R. Co.*, 61 Fed. 158, 159-160 (9th Cir. 1894).

For similar decisions after the addition of the proviso to section 3(1) in 1940, see *Chicago, Milwaukee, St. P. & P. R.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 456 (1957), *aff'd*, 182 F.Supp. 81 (E.D. Wis.), 366 U.S. 745; *Denver & Rio Grande Western R.R. Co.* v. *Union Pacific R.R. Co.*, 287 I.C.C. 611, 619 (1953), *aff'd* 351 U.S. 321; *Atlantic Coast Line R.R. Co.* v. *Southern Rwy. Co.*, 302 I.C.C. 711, 716 (1958); *Consolidated Mining & S. Co. of Canada* v. *N.Y. Central R.R. Co.*, 299 I.C.C. 231, 234-235 (1956); *Coastwise Rates Between Gulf Ports and Texas*, 234 I.C.C. 557, 560 (1939).

And for similar decisions under the discrimination and prejudice section of the Motor Carrier Act, see *Freight, All Kinds, Chicago & I.H.B. Ind., Mich., Ohio*, 322 I.C.C. 423, 427 (1964); *Proportional Rates Between Harrisburg, Pa., and Points in Penna.*, 315 I.C.C. 499, 503 (1962); *Commodities Between Illinois, Kansas and Missouri*, 31 M.C.C. 323, 325-326 (1941); *Fort Smith & Western Ry. Co.* v. *Atchison T. & S.F. Ry. Co.*, 216 I.C.C. 411, 432 (1936).

C. SECTION 1(4) IS INAPPLICABLE

The Government also attempts to tie the first clause of section 1(4) of the Act, 49 U.S.C. 1(4),[24] into the package of anti-discrimination provisions upon which it relies. Once again, the Commission did not cite that provision, and with good reason. To the extent the Report reveals the Commission's purpose in promulgating the "open tariff" rules, that purpose was related in some way to discrimination, as the Government says. But it is sections 2 and 3 of the Act that regulate discrimination, not section 1(4), and none of the decisions cited by the Government indicate the contrary. The office of section 1(4) is to fix the carrier's more general duty to afford reasonable service. A typical section 1(4) question would be whether railroads are obliged to furnish oil tank cars. See, *e.g., United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208. As to TOFC service, a section 1(4) question might be whether the railroads are obliged to purchase more equipment so that the service could be instituted between additional points. But the only issue in the case at bar is whether the railroads must treat motor carriers precisely the same as shippers. That is a discrimination question, not a section 1(4) question; and if we are correct in our view that neither section 2 nor 3 imposes such an obligation upon railroads, then it is inconceivable that section 1(4) would.

The Commission may well have had an additional reason for not relying upon section 1(4): the only remedy for a violation of that section is in the courts, not in the Commission. Thus, in *Wells & Son* v. *Chicago, B. & Q. R. Co.*, 161 I.C.C. 145 (1930), the Commission concluded that it

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[24] "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor. . . ."

could not provide relief even though it was of the view that the defendant's conduct contravened section 1(4). The Commission stated:

> "Paragraph (4) of section 1 . . . makes it the duty of every carrier to provide and furnish transportation upon reasonable request. In *United States* v. *Pennsylvania R.R. Co.*, 242 U.S. 208, the court held that this commission has no jurisdiction to enforce by order the duty provided in said paragraph, and that the remedy for a failure to perform said duty lies in the courts.
>
> "Upon consideration of the evidence we . . . find that the defendant's tariff herein named requires it to perform the switching service requested by the complainants, and that the refusal of the defendant to perform such service in accordance with the said tariff is a violation of its tariff and of its duty under section 1, paragraph (4) of the act. We conclude, however, that this commission is without jurisdiction to prescribe a remedy for either of said violations." *Id.*, at 148-149.

Accord, *Oliver Manufacturing Supply Co.* v. *Reading Co.*, 297 I.C.C. 654, 658 (1956); *Jacksonville Port Terminal Operators Association* v. *A. T. & N. R. Corp.*, 263 I.C.C. 111, 116-117 (1945); *Joseph A. Goddard Realty Co.* v. *New York, C & St. L.R. Co.*, 229 I.C.C. 497, 502 (1938); *Hines* v. *Henaghan*, 265 Fed. 831 (4th Cir. 1920); *Baird Bros.* v. *Mpls. & St. L.R. Co.*, 181 Ia. 1104, 165 N.W. 412, 418 (1917); cf. *Louisville & Nashville R.R. Co.* v. *Cook Brewing Co.*, 223 U.S. 70.[25]

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[25] This is not a principle the Commission has applied consistently in practice. Thus, in *Ringsby Truck Lines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945), one of the cases in which the Commission held that a motor carrier could not utilize as a shipper the "open tariff" TOFC services of a railroad, the section 1(4) claim of the motor carrier was decided on

III. THE COMMISSION'S RULES ARE INCOMPATIBLE WITH VARIOUS PROVISIONS OF THE STATUTE.

Not only is there no affirmative support in the statute for the "open tariff" rules, but a number of provisions of the Act are incompatible with those rules. Fundamentally, the infirmity of the rules, viewed from this aspect, stems from the Commission's erroneous determination that a motor carrier may be treated as both a carrier and a shipper with respect to the same movement. The product of this determination, the "open tariff" rules, conflicts with the statutory provisions delineating the operating authority of motor carriers—particularly when considered together with the through route-joint rate provisions of the statute—as well as the provisions regulating freight forwarding.

A. *The Commission's Rules Undermine The Operating Authority And Through Route-Joint Rate Provisions Of The Act.*

An unexceptionable method of providing coordinated motor-rail TOFC service is the establishment of through routes and joint rates. However, under section 216(c) of

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the merits rather than dismissed. See also *New York Central Railroad Co.* v. *United States*, 201 F.Supp. 958 (S.D.N.Y. 1962), *vacated*, 371 U.S. 805, where the court held that the Commission did have jurisdiction under sections 1(4) and 1(6) to annul an embargo of a carrier. And the Commission, as some of the cases cited in the text indicate, feels free to base an order on section 1(4) where the order is also grounded upon other provisions, normally section 2 or 3. See also in this connection *Trojan Scrap Iron Corp.* v. *Boston & M.R.*, 270 I.C.C. 727, 729-30 (1948), where the Commission appeared to take the position that it could enter an order under section 1(4) in circumstances where the carrier would not be required to add extra equipment. In *Trojan*, however, the order was also based upon section 3, so that, under the general rule expressed in the cases cited in the text, the Commission was free to refer to section 1(4). At any rate, the point is that the rule with respect to the Commission's want of jurisdiction over a section 1(4) claim, unless the claim is also supported by provisions such as section 2 or 3, has been plainly and repeatedly stated by the Commission in decisions that have never been overruled; and especially in such circumstances the Court should not consider in support of the rules this provision that was not cited by the Commission.

the Act, 49 U.S.C. 316(c), through route and joint rate arrangements must be voluntary. The Government maintains that the "open tariff" rules would not result in the establishment of through routes, and that in any event the rules do not involve compulsion. The other railroad appellees disagree with the Government on both counts—they maintain that the rules would establish compulsory through routes.

We take an intermediate position. We do not ask the Court to determine whether in fact the "open tariffs" would result in the establishment of through routes. In our view, if the "open tariff" rules do *not* involve through routes, they are certainly invalid, because the through route provision is the exclusive method under the Act for coordination of rail and motor carrier service. And even if we are wrong about that, it is still not necessary to decide whether the rules would produce through routes, since the Commission did not dispute that through routes would result, but held only that there would be no compulsion; and as to this, the Commission erred. Finally, in any event the Commission's Report is so obscure with respect to the question of through routes that the Government's contention that the "open tariffs" would not produce through routes cannot be accepted.

1. *The through route section is the exclusive provision for coordination of rail-motor services.* The plain implication of the through route provision is, as the District Court held, that "[T]he through route permitted by Section 216 (c) is the exclusive statutory authority for the use of rail transportation by motor carriers . . ." (R. 35). The Congress having committed the establishment of joint motor-rail service to the choice of the parties in through route arrangements, there is no room for the establishment of such service by any other means. As this Court stated in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60,

72: "The Interstate Commerce Act contains no provision by which the Commission may compel non-rail motor carriers to coordinate their road service with rail service or may compel rail carriers to coordinate their service with motor carriers." See also *Acme Fast Freight, Inc.* v. *United States,* 30 F. Supp. 968 (S.D.N.Y. 1940), *aff'd,* 309 U.S. 638.

This decision of the Congress not to empower the Commission to compel the establishment of through motor-rail routes and joint rates may be thought unwise. The Commission has so concluded. It has frequently urged the Congress to change its mind, but to no avail.[26] Particularly in such circumstances, we suggest, the Court is entitled to view with skepticism the Commission's newly discovered source of authority to accomplish coordination outside the restrictions of the through route-joint rate provisions.

There is another policy consideration involved here quite apart from the Congress' decision to leave motor-rail relations to the negotiation of the parties. Under the through route provisions, 49 U.S.C. 317(a), 906(a), carriers must comply with specific requirements respecting the filing of tariffs. While the Commission's rules purport to supply equivalent protection to shippers where motor carriers use "open tariff" TOFC service, the Congress did not intend that this protection be granted or withheld in the discretion of the Commision. In this case the protection may be adequate; in the next it may not. Under the Commission's approach, there will be no statutory test.

Entirely apart from section 216(c), the fundamental structure of the Act evidences the Congressional intent that, absent some statutory exception, motor carriers are author-

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[26] See the Commission's 80th Annual Report (1966) p. 127; 77th Annual Report (1963) p. 19; 76th Annual Report (1962) p. 201; and 75th Annual Report (1961) p. 186. Bills to amend the Act were introduced but were not passed. S. 3510 and H.R. 12362, 87th Congress, and S. 676 and H.R. 2088, 88th Congress.

ized only to operate by motor vehicle upon the highways and are not free to act as if they were shippers and arrange for the transportation of freight by rail. In the various parts of the Act, Congress has subjected the different modes of transportation to a comprehensive pattern of regulation and has defined the type of service to be performed by each mode. The plain implication is that each mode may act only within the scope of the Congressional grant of authority. Thus, in the case at hand, the motor carriers, in proposing to use rail "open tariffs" to transport freight, must establish that they will be engaged in the service they are authorized to perform as motor carriers. There is no dispute as to this basic principle, nor could there be, since Rule 3 itself indicates that the premise of the rules is that, in hiring the railroads to perform TOFC service, the motor carriers would be engaged "in the performance of all or [a] portion of their authorized service."

But it is clear that, in acting as shippers in tendering freight to railroads, the motor carriers would *not* be performing "their authorized service" but rather would be avoiding such service, since the Congress has empowered motor carriers only to transport freight in motor vehicles and over the public highways. Thus, for example, "common carrier by motor vehicle" is defined as "any person which holds itself out to the general public to engage in . . . transportation by motor vehicle . . ." 49 U.S.C. 303(a)(14). And "motor vehicle" is defined as any "trailer, or semitrailer . . . used upon the highways . . . but does not include any vehicle . . . operated exclusively on a rail or rails." 49 U.S.C. 303(a)(13).

The District Court, relying upon these and cognate provisions in Part II, as well as upon the general statutory scheme, held:

> "The internal structure of the Interstate Commerce Act itself bears evidence of the limited authority con-

> ferred on the carrier. Each mode of transportation is the subject of a separate formal part of the Act: Part I deals with rail carriers; part II with carriers by motor vehicle; part III with carriers by water; and part IV with freight forwarders. The certificate of public convenience and necessity or license appropriate for each mode of transportation is, by its terms and by the internal logic of the legislation, confined to transportation by that mode. Thus the certificate issued to a motor carrier constitutes a formal determination of the public need for motor transportation, regardless of the availability of other modes, and authorizes the holder to engage in for-hire transportation by 'motor vehicle', not by rail or other modes, and on the 'public highway.' (R. 30-31).

This holding of the District Court—that in the absence of a through route arrangement the type of "coordination" envisioned by the rules is improper—is, as the court noted, "supported and confirmed by the consistent and repeated decisions of the Commission and the courts" (R. 37). In *Substituted Freight Service*, 232 I.C.C. 683, 690 (1939), the Commission held that a motor carrier could not, acting as a shipper, lawfully substitute rail service for its authorized highway service in the absence of a valid joint rate through route, because to do so would be "repugnant to the Act." We say that this was a holding; the Government says it was *dictum* (Br. 55). But it is bootless to debate the matter, since the principle announced in *Substituted Freight Service* was consistently adhered to in subsequent opinions through the *New Haven* decision in 1954 down to *Ex Parte 230*.[27]

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[27] In addition to *New Haven*, see *Greer Broker Application*, 23 M.C.C. 417 (1940); *Stone's Express, Inc. Common Carrier Application*, 32 M.C.C. 525 (1942); *Ringsby Trucklines, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 263 I.C.C. 139 (1945); *Savage Application*, 265 I.C.C. 157 (1947); *Peninsula Truck Lines, Inc.* v. *Puget Sound Nav. Co.*, 292 I.C.C. 157, 164 (1954).

As to judicial decisions, the lower court cited *Acme Fast Freight, Inc.*, v. *United States*, 30 F. Supp. 968 (S.D. N.Y. 1940), *aff'd*, 309 U.S. 638, and *Ready Truck Lines, Inc.* v. *United States*, 42 F. Supp. 970 (N.D. Ill. 1941), *aff'd*, 314 U.S. 580. As the court stated, "The relevant premise of [these] decisions is that the authorized service of the common carrier by motor vehicle under the law is transportation over the public highways by motor vehicle, not rail transportation by railroad (R. 38-39). See also *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (D. Neb. 1965), *aff'd*, 382 U.S. 67; *Moore* v. *United States*, 41 F. Supp. 786 (D. Minn. 1941), *aff'd*, 316 U.S. 642; and *Kline* v. *United States*, 41 F. Supp. 577 (D. Neb. 1941). In its motion to affirm in *Andrews Van Lines* (pp. 4-5), the Government correctly stated: "Plainly the statute did not intend to treat carriage by ship, plane, or train as carriage by motor vehicle." It follows that a motor carrier which employs rail TOFC service to substitute for motor carriage in the absence of a valid through route arrangement is not performing its authorized service.

2. *Even if the through route provisions are not exclusive, the joint service here involved is illegal because it is involuntary.* Even if the Court were to accept the Government's contention that a joint motor-rail service may be performed without the establishment of through routes, the case should still be decided against the Government without reaching the question whether the rules would actually result in the establishment of through routes. The only point of determining whether through routes are involved would be to determine whether it would be necessary to reach the further question whether the service would be compelled by the rules rather than voluntary, since through routes between motor carriers and railroads must be volun-

tary. But, if the same principle of voluntariness applies to the joint service here involved even assuming that service does *not* involve through routes, then the question is the same as if through routes were involved, namely, whether there is compulsion. Stated otherwise, even assuming that through routes are not the exclusive method for establishing joint motor-rail service and that the service here involved would not result in through routes, the Government cannot prevail unless it can also establish that either (a) this joint service, as opposed to through route service, *may* be compelled by the Commission, or (b) the rules would *not* compel such joint service.

As we now show, (a) this joint service cannot properly be compelled; and (b) the Government's effort to demonstrate that the service is in fact not compelled by the rules is unpersuasive.

a. Whether or not the motor-rail service contemplated by the rules would amount to a through route service, it obviously would afford substantially the same advantages to the motor carriers. That is, just as in the case of a through route, the motor carrier could offer the shipper transportation partly by motor and partly by rail on a single bill of lading without the shipper's being required to intervene to transfer lading at any point between origin and destination. We submit that the Congress, in committing to the discretion of the carriers the question whether through routes should be established between motor carriers and railroads, foreclosed the Commission from compelling the establishment of a joint service of the sort here involved against the will of the railroads.

There is no case law directly in point, since the well established law, as we have indicated, is that joint service requires the establishment of a through route, which, of course, must be voluntary. But in any event the Government cannot maintain that the joint service to be established under the

rules could be compelled by the Commission, since the Commission itself did not adopt such a view. Rather, the Commission stated, in response to the argument that the rules would compel through routes, simply that the rules "would involve no compulsion whatever—either on rail carriers to hold out a TOFC service or, if they do, on motor carriers to use it" (Rep. 335). And again, later in its decision the Commission conceded that it "is without power to require a rail carrier to provide TOFC service jointly with motor carriers . . ." (Rep. 377).

b. The remaining question, then, is whether the joint service would be compelled by the rules within the meaning of the statutory prohibition. The Commission's disingenuous answer is, as we have noted, that there would be no compulsion because, instead of performing the TOFC service for motor carriers, the railroads could stop performing it for shippers. This argument might be meaningful were the "alternative" meaningful. But it is simply fanciful to say that there is no compulsion here because the railroads may, if they choose, surrender their multimillion dollar investment in TOFC.

The fallacy of the Commission's position is, perhaps, even plainer if the principle of the rules is carried over to other transportation services. The approach adopted by the Commission respecting "open tariffs" can hardly be confined to TOFC service. If the rules are upheld the result will be that every carrier of every description will be entitled to use, as a shipper, every service of every other carrier. In order to prevent this, a carrier would have to cease operations altogether. Such an "alternative" can hardly evidence "voluntariness."

In sum, whether or not the establishment of a through route is the exclusive method of performing the type of joint motor-rail service here involved, and whether or not that service involves through routes, the Commission still

cannot compel the railroads to participate in such service, and the rules would result in such compulsion. In consequence, the rules are beyond the authority of the Commission.

3. *In any event, the Rules cannot be upheld on the ground that they would not involve through routes, because the Commission's report provides no adequate basis for such a determination.* If what we have said up to now is wrong, the Government still should not prevail because its contention that the "open tariff" rules would not result in the establishment of through routes has no decent foundation in the report.

It is clear enough from the briefs of the other parties that the question whether a particular transportation service does or does not involve through routes is often exceedingly complex. However, we suggest that the Court need not pursue the matter. On the basis of the Commission's report only two conclusions are possible: Either it must be assumed *arguendo* that the "open tariffs" would result in through routes, or it must be concluded that the Commission's discussion of the matter is so hopelessly ambiguous that the case should be remanded. The relevant considerations are as follows:

a. While at one point in the Report (p. 355) the Commission indicated that the services to be provided under the Rules would not involve through routes, in the critical portions of the Report in which the Commission dealt with the question of compulsory through routes, the Commission, as the lower court observed, "did not dispute . . . that requiring railroads to offer open-tariff TOFC service to motor carriers would amount to establishing compulsory *de facto* through routes. The Commission avoided the argument . . . by concluding that no compulsion was involved in its Rules" (R. 32; Rep. 334-335). Accordingly, once

again the Government is attempting to defend the rules upon a basis quite different than that relied upon by the Commission.

b. The Commission held that Plan I arrangements were valid through route agreements (Rep. 342-343). But there is no possible basis for distinguishing Plan I arrangements from the service that would be performed under the "open tariff" rules. As the lower court pointed out, "The operative features of that Plan [I] are identical with the TOFC service contemplated by the Commission's newly promulgated Rule 3. In each case the motor carrier has the option, subject to the shipper's veto, to employ substituted rail service or to haul the trailers over the highway. The shipper pays the motor carrier's rates upon motor carrier bills, and the motor carrier is subject to limits on circuity and points of service. The only difference between the two schemes is the railroad's consent under existing Plan I" (R. 34). Accordingly, if Plan I involves through routes, so does "open tariff" service—or at the least the Commission should be required to state why it does not.

c. At this point it seems desirable to describe briefly the litigation pending in a three-judge court in the Northern District of Texas respecting Plan I,[28] since the Government's contention respecting the absence of through routes under "open tariffs" is squarely contrary to the argument it has made in that court respecting Plan I. In Texas, these appellees, the Southern Railway System, have joined the freight forwarders in attacking the validity of Plan I on the ground that it does not involve a genuine through route-joint rate arrangement. The Commission and the United States have been joined by a number of railroads and by the motor carrier appellants in defense of Plan I.

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[28] *Lone Star Package Car Co. v. United States* (Civ. No. 4-355).

While the arguments made on both sides in Dallas are complex, one contention that was advanced by the plaintiffs is particularly pertinent here in view of the Government's brief in this Court. In Dallas, the plaintiffs maintain that one of the principal reasons for the invalidity of Plan I under the through route provisions of the Act is that the shipper under that Plan does not have the right to demand the motor-rail service; he can only veto it. The United States and the Commission, however, urged that that consideration is irrelevant to the through route question. That is the Government's position in Dallas. In this Court, however, the Government states: " '[T]he test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service.' . . . In open-tariff service . . . [t]here is no holding out by the railroad of service; [footnote as follows:] The shipper is merely advised that, unless he stipulates to the contrary, the motor carrier may, at its option, substitute open-tariff rail piggyback service for a portion of the freight movement" (Br. 60-61). The contradiction is flat and goes to the heart of the through route issue both in this Court and in Dallas.

We do not suggest that this Court resolve the contradiction. We had hoped that the Dallas case, which was argued on November 5, 1965, would have been ripe for review by this Court together with the case at bar. However, the Dallas court seems to be holding the case there until this Court disposes of the "open tariff" question. Doubtless this Court's decision may have a marked impact on the Dallas case. If this Court reaches the issue and holds that the "open tariff" rules would, or would not, produce through routes, the Plan I litigation may be at an end.

What we do suggest is that the Government should not be permitted to defend the rules on the ground that they would not involve through routes when (1) the Commission

assumed *arguendo* that they would involve through routes; (2) the Commission's determination that Plan I does involve through routes is not compatible with a determination that "open tariffs" would not; and (3) the Government advances in this Court a rationale in defense of "open tariffs" that is incompatible with its argument in Dallas in defense of Plan I. At the least, in such circumstances the case should be remanded to the Commission under the *Chenery* principle.

B. *The Rules Would Permit Motor Carriers To Engage In Freight Forwarding, Contrary To The Provisions Of Part IV Of The Act.*

The Government states that "[t]he railroad appellees do not join in" the argument respecting the freight forwarder provisions of the Act. This prediction cannot have been based upon our briefs in the lower court, where we supported the freight forwarder appellees without reservation.[29] At any rate, we reaffirm our support of the argument made in the separate brief of the freight forwarder appellees.[30]

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[29] Nor did we intend to reverse our position in our Motion to Affirm in this Court, where, for purposes of economy of presentation, we stated: "We do not in this motion discuss another independent ground upon which the District Court rested its judgment—that the rules are invalid because . . . they permit motor carriers to act as freight forwarders. This issue is thoroughly discussed in the motion to affirm filed by the freight forwarders." It is difficult for us to perceive how the Government could have been led by this statement to believe that we had abandoned an argument that we had pressed upon the District Court.

[30] We do so, moreover, without sharing the concern of the Government that if that argument is accepted "it would preclude the railroads from providing piggyback service to motor carriers even on terms dictated by the railroads." Putting aside the pejorative last phrase of this assertion, we do not really understand what the Government is saying. Neither the freight forwarders nor the railroads contend that there is anything illegal about joint rate TOFC arrangements that qualify as genuine through route agreements under the statute. As we have already pointed out

We do not wish, in this brief, to duplicate the brief of the freight forwarders, who explore this issue at length. We merely stress several points that appear to us to be particularly salient:

1. The permit provisions of Part IV, 49 U.S.C. 1010, were obviously enacted with the idea that the Commission would regulate the number of freight forwarders in business so that destructive competition would be avoided and healthy competition encouraged. Unless the Congress contemplated that motor carriers were to be free to perform freight forwarding by virtue of their motor carrier certificates, the "open tariff" rules undercut the freight forwarder regulation provided by the Congress if they permit motor carriers to engage in freight forwarding.

2. On the face of the statute, it seems highly improbable that motor carriers are, by virtue of their motor carrier authorization, entitled to perform freight forwarding, since the Act prohibits motor carriers from securing freight forwarder permits. 10 U.S.C. 1010(c).

3. The Government's argument that "[t]here is inevitably a good deal of overlap between the functions of motor carriers and railroads, on the one hand, and freight forwarders on the other" (Br. 64) does not detract from this conclusion. All the Government says in support of this assertion is that "[s]ince a substantial number of motor carrier shipments are less than truckload, consolidation of small shipments is a very important aspect of a motor carrier's service" (*ibid.*). Of course this is true. But it has to do only with the physical matter of consolidating shipments into trailerloads for operating convenience. It is obviously to the advantage of motor carriers that their trailers be as

(*supra*, p. 41), it is well established that the Act gives motor carriers and railroads the right to enter into such agreements; it does not give freight forwarders the same right.

full as possible, since the several separate less-than-truckload shipments are charged the higher less-than-truckload rates while, with proper consolidation, the carrier's expenses for over-the-road shipment can be based on full truckloads.[31]

Under the "open tariff" rules, however, the motor carrier could do much more than simply consolidate for operating convenience. He could operate in all respects precisely as a freight forwarder. That is, (1) he could confine his activities to consolidating and breaking bulk—indeed, under Plan II he could even require the railroad to perform these services so that he would not even touch the freight—and (2) he could make his profit on the difference between the rate paid him by the shipper and the railroad's transportation charge. This is the heart of freight forwarding. "Freight forwarders consolidate less-than-carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less-than-carload rates; their expenses and profits are derived from the spread between the carload and l.c.l. rates." *Chicago, Milwaukee, St. P. & P. R.R. Co.* v. *Acme Fast Freight, Inc.* 336 U.S. 465, 467. When a motor carrier does precisely the same thing, as it would be able to do under the "open tariff" rules, it is acting as a freight forwarder without a permit.

IV

THE "OPEN TARIFF" RULES ARE INCONSISTENT WITH THE NATIONAL TRANSPORTATION POLICY.

The Government puts a good deal of emphasis upon the National Transportation Policy, which of course is an important guide in construing the provisions of the Act.[32]

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[31] When a motor carrier "consolidates" in this fashion, he is acting "as a carrier" within the meaning of Section 402(a)(5), 49 U.S.C. 1002(a)(5).

[32] To the extent the Government implies that this Court, in *United States*

But, as we have already indicated at some length, the factual premises for the Government's contention cannot be found in the Commission's report or in the record.

Because the Commission did not see to it that an adequate record relating to the "open tariff" rules was compiled, it is not possible to measure accurately the probable impact of the "open tariff" rules. However, the character of those rules does permit a reasoned estimate. As we now show, that estimate is that the rules would confer an unfair benefit upon the motor carriers to the ultimate disadvantage of the shipping public. Moreover, as we also show, the rules would not cure the evil practices described by the Government, even if those practices did in fact exist.

The main points in an analysis of the likely effect of the Rules are these: (1) Under the Rules, a motor carrier could not tender its shipper's freight to a railroad under a TOFC "open tariff" unless the shipper could himself tender the freight directly to the railroad for TOFC transportation. (2) Under the Rules, the shipper whose freight the trucker could ship via rail TOFC service would pay the truck rate for the movement, not the railroad TOFC rate. (3) Under the Rules, the shipper could not direct the motor carrier to use TOFC service: that choice would be left to the motor carrier subject only to a veto by the shipper—a veto which, as a practical matter, would probably seldom be exercised.

The first conclusion that seems clear enough on the basis of these considerations is that the Rules would not make available to shippers an additional TOFC service, since by hypothesis that service would already be available to them directly from the railroads.

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v. *Pennsylvania R. Co.*, 323 U.S. 612, held that the Policy can serve as a substitute for specific statutory authority, the Government is wrong. There the Court merely held that, in light of the Policy, specific sections of the Act should be construed to authorize the Commission's action. The Court concluded: "These sections provide sufficient authorization for the Commission's order." *Id.*, at 619.

If the shipping public would not gain a wider choice of service, would the Rules have an impact on rates? Very likely they would, but hardly a salutory one. By enabling the motor carriers to cast part of their legitimate costs upon the railroads, the rules probably would cause railroad rates to rise to a level higher than they would otherwise be. What would likely happen is this:

As we have indicated, once the shipper has tendered his freight to a motor carrier the choice whether to ship via TOFC will be the motor carrier's, not the shipper's. Naturally, the motor carrier will use TOFC service only when it is to its advantage. There are three obvious situations in which this might be the case. First, where the TOFC rate is lower than the motor carrier's cost of transporting the freight, the motor carrier could make money by paying the railroad to perform the transportation by TOFC rather than hauling the freight over the highway itself. In such a case the motor carrier's profit on the motor carrier rate paid to it by the shipper could be increased (or its loss decreased) simply by turning the shipment over to the railroad. Of course, a shipper who tenders freight to a trucker at a rate higher than an available TOFC rate would not be acting strictly on the basis of price; but shippers are not always motivated solely by price considerations. And, while the motor carrier which is able to sell its service in such circumstances is obviously entitled to whatever profit it can make in terms of its costs of *highway* transportation, for that carrier to increase its profit by virtue of the lower costs of *railroad* transportation hardly seems either fair or in accord with the National Transportation Policy goal of a system in which each carrier plays the role for which it is economically best suited.

There are at least two other situations in which a motor carrier might choose to utilize TOFC service rather than perform the transportation itself. Where the motor car-

rier has no return load from the point of destination to the point of origin, it would probably be able to lease a trailer for a one-way TOFC movement at a lower cost than that of its own round-trip movement. And, even absent return load considerations, the motor carrier could probably reduce its overall costs by leasing TOFC equipment for peak load (*e.g.*, weekend) movements. In both cases, the motor carrier would be shifting to the railroad part of the costs of transportation between particular points while retaining to itself its most profitable traffic. The result seems evident: In circumstances where railroad TOFC service is in fact the low cost mode of transportation, the railroads would be disabled in making use of their advantage because their trucking competitors would be artificially increasing TOFC costs. In time, economic necessity would force increases in the TOFC rates. Thus, it is plain enough that the shipping public would be harmed and that the result would hardly be in accord with the National Transportation Policy, which directs that each form of transportation be accorded the benefits and assume the burdens of its inherent advantages and disadvantages.

While these are not the only deleterious effects the railroads anticipate from the Rules, they are illustrative. Moreover, we suggest that their character—although surely not their extent—is demonstrable even without a record. We add that it is significant in this connection that *no shipper interests* supported Rules 2 and 3 before the Commission, and none support them here.

Finally, consider how ill-designed the "open tariff" rules are to deal with the problems the Government says exist—problems that all center upon the assertion that the railroads are using their control of rail TOFC to preclude motor carriers from participation in the motor carriage incidental to TOFC. Assume that to be so. The Government does not indicate how the "open tariff" rules would remedy the

situation. Under those rules, the railroads would still be free to lease equipment to shippers; they would still be free to perform door-to-door service under Plan II; they would still be free to enter into through route-joint rate arrangements with some motor carriers but not with others, and the divisions of revenue under those arrangements would not have to be related to the "open tariff" charges. Indeed, the Government itself concedes that motor carriers would not employ the "open tariff" rules "normally"—"a motor carrier will normally find it more advantageous to use its own trucks, since the out-of-pocket cost of moving freight with its own equipment is likely to be less than the cost of employing another carrier to do so at rates that reflect both the total costs of, and a profit for, the second carrier" (Br. 58).

We have indicated above situations in which this differential might occur—*e.g.*, shipments where the motor carrier does not have a return load. Unquestionably in those situations it would be helpful for motor carriers, and harmful for railroads, to operate under the "open tariff" rules. But the only way in which this can be regarded as somehow relevant to the discriminatory practices dwelt upon by the Government is as some sort of generalized punishment against the railroads.

In short, the proper remedy for the problems perceived by the Government, assuming they exist, is not the "open tariff" rules, but legislation. Both the Commission and the Administration have sought legislation, but unsuccessfully. As we have already noted (*supra*, p. 57), the Commission has frequently asked the Congress to give it authority to compel the establishment of through routes and joint rates between railroads and motor carriers, but those requests have not been granted. Also, in 1962 and 1963 the Ad-

ministration unsuccessfully proposed legislation that would have amended section 2 of the Act by adding:

> "Common carriers subject to the provisions of this part shall not unjustly discriminate as to service or rates in the transportation of loaded or empty vehicles or shipping containers tendered for transportation by any shipper or carrier, whether or not regulated." S. 3242, H.R. 11584, 87th Cong., 2d Sess.; S. 1062, H.R. 4701, 88th Cong., 1st Sess.

Two features of this proposed legislation—besides the fact that it was not enacted—are of interest.[33] First, it reflected a recognition that, unless "service" was specifically referred to, section 2 alone would not suffice to require railroads to offer TOFC service to other carriers. Second, the proposal was limited to TOFC service, whereas the Government's view of the requirements of section 2 can hardly be so limited and accordingly would have unpredictable consequences across the entire range of transportation services. To fashion such a radical departure from precedent in a rule-making rather than in a legislative proceeding is not only bad law, but also bad policy.

Conclusion

The Commission's action in this case represents an extraordinary assumption of legislative authority. For some reason not at all disclosed by the Commission's report, the Commission evidently concluded that "open tariff" rules would be beneficial. Since no one was on adequate notice while the record was being made that such rules might be in the offing, no one attempted to demonstrate either that,

[33] The legislative history of the proposal is explored in the briefs of other appellees.

as we believe, they would be undesirable, or that, as the Government asserts, they are imperatively necessary. Bereft of a record that could support the rules on any policy ground, the Commission ambiguously suggested that section 2 of the Act might compel the rules as a matter of law. In this Court—though not in the lower court—the Government abandons the limitations of the record and claims that the railroads are out to "dominate" the motor carriage incident to TOFC, and devises additional statutory authority that it claims supports the rules. For the reasons set forth above, we submit that this effort should not succeed and that the judgment of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX

Statutes and Rules

Interstate Commerce Act, National Transportation Policy, note preceding section 1, 49 U.S.C. 1:

* * * "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act * * * shall be administered and enforced with a view to carrying out the above declaration of policy."

* * * * * * *

Interstate Commerce Act, section 1(4), 49 U.S.C. 1(4):

* * * It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable

through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

* * * * * * *

Interstate Commerce Act section 2, 49 U.S.C. 2:

If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful. * * *

* * * * * * *

Interstate Commerce Act, section 3(1), 49 U.S.C. 3(1):

* * * It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region,

district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

Interstate Commerce Act, section 3(4), 49 U.S.C. 3(4):

* * * All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * * * * * *

Interstate Commerce Act, section 15(3), 49 U.S.C. 15(3):

* * * The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this chapter, or by carriers by railroad subject to this chapter and common carriers by water subject to chapter 12 of this title, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through

route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule cancelling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section. * * *

* * * * * * *

Interstate Commerce Act, section 216(c), 49 U.S.C. 316(c):

* * * Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers party thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so established and all classifications, regulations, and practices in con-

nection therewith shall be subject to the provisions of this chapter.

Interstate Commerce Act, section 216(d), 49 U.S.C. 316(d):

* * * All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * * * *

Interstate Commerce Act, section 217(a), 49 U.S.C. 317(a):

* * * Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares,

and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

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Interstate Commerce Act, section 306(a), 49 U.S.C. 906(a):

* * * Every common carrier by water shall file with the Commission, and print, and keep open to public inspection tariffs showing all rates, fares, charges, classifications, rules, regulations, and practices for the transportation in interstate or foreign commerce of passengers and property between places on its own route, and between such places and places on the route of any other such carrier or on the route of any common carrier by railroad or by motor vehicle, when a through route and joint rate shall have been established. Such tariffs shall plainly state the places between which property or passengers will be carried, the classification of property or passengers and, separately, all terminal charges, or other charges which the Commission shall require to be so stated, all privileges or facilities granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such rates, fares, or charges, or the value of the service rendered to the passenger, shipper, or consignee.

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Interstate Commerce Act, section 402(a)(5), 49 U.S.C. 1002(a)(5):

* * * The term "freight forwarder" means any person which (otherwise than as a carrier subject to chapters 1, 8, or 12 of this title) holds itself out to the general public as a common carrier to transport or provide transportation

of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title.

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Interstate Commerce Act, section 410(a)(1), 49 U.S.C. 1010(a)(1):

* * * No person shall engage in service subject to this chapter unless such person holds a permit, issued by the Commission, authorizing such service; except that (1) any person engaged in service subject to this chapter when this section takes effect may continue to engage in such service for a period of one hundred and eighty days thereafter without a permit, and (2) if application for a permit is made to the Commission by such person within such period, such person may, under such regulations as the Commission shall prescribe, continue to engage in such service subject to this chapter until otherwise ordered by the Commission.

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Interstate Commerce Act, Act, section 410(c), 49 U.S.C. 1010(c):

* * * The Commission shall issue a permit to any qualified applicant therefor, authorizing the whole or any part of the service covered by the application, if the Commission finds that the applicant is ready, able, and willing properly to perform the service proposed and that the proposed service, to the extent authorized by the permit, is or will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such appli-

cation shall be denied. No such permit shall be issued to any common carrier subject to chapters 1, 8, or 12 of this title; but no application made under this section by a corporation controlled by, or under common control with, a common carrier subject to chapters 1, 8, or 12 of this title, shall be denied because of the relationship between such corporation and such common carrier.

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Ex Parte 230 Rules 2 and 3, 49 C.F.R. 500.2, 500.3:

2. *Availability to all of TOFC service.*—TOFC service, if offered by a rail carrier through its open tariff publications, shall be made available to any person at a charge no greater and no less than that received from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

3. *Use of open-tariff TOFC service by motor and water carriers in the performance of economically regulated transportation.*—

(a) Except as otherwise may be prohibited by these rules, motor common and contract carriers, water common and contract carriers, and freight forwarders may utilize TOFC service in the performance of all or any portion of their authorized service through the use of open-tariff TOFC rates published by a rail carrier.

(b) Motor and water common carriers shall utilize open-tariff TOFC service only if their tariff publications give notice that such service may be utilized at their option, but that the right is reserved to the user of their services to direct that in any particular instance TOFC service not be utilized.

(c) Motor and water contract carriers shall utilize open-tariff TOFC service only if their transportation contracts and schedules make appropriate provision therefor.

(d) Tariffs of motor and water common carriers and contracts and schedules of motor and water contract

carriers providing for the use of open-tariff TOFC service shall set forth the points between which TOFC service may be performed and the names of the rail carriers whose TOFC service may be utilized.

(e) Motor and water common and contract carriers utilizing open-tariff TOFC service in the performance of authorized transportation shall tender traffic to and receive traffic from rail carriers only at points which the motor and water carriers are authorized to serve.